HISTORY and PRACTICE

OF THE

HIGH COURT of CHANCERY.

IN TWO VOLUMES.

CONTAINING:

The RISE and PROGRESS of the EXTRAORDINARY JURISDICTION,

OF THE

COURT of EQUITY:

TOGETHER

With the RULES that govern therein.

By THE LATE LEARNED

JUDGE *GILBERT.*

VOL. I.

Antiquos exquirite Fontes.
——Vox exemplaria Legum——
Nocturna verſate manu, verſate diurna. HOR.

DUBLIN:
Printed by RICHARD WATTS, Bookſeller, in *Skinner-Row*, from the Original MANUSCRIPT, with the Addition of ſeveral Marginal REFERENCES; two Copious INDEXES; and two CASES in CHANCERY, &c. not contained in the LONDON Edition. 1758.


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Forum Romanum.

CHANCERY.

TO conſider the diviſion of the courts of juſtice we muſt ſee how they ſtood immediately before ſuch diviſions were made; and from the time of the *Saxons* till the reign of *Edward* the firſt, the ſeveral county courts and Sheriffs courts, did decline in their intereſt and authority. The method by which they were broken were two-fold:

First, by granting commiſſions to the Sheriffs by a writ of juſticies; whereby the Sheriff had a particular juriſdiction granted him to be judge of a particular cauſe independent of the ſuitors of the county court, and theſe commiſſions were after the *Norman* form, by which all power of judicature was immediately derived from the Prince; theſe commiſſions were neceſſary to give the Sheriff a juriſdiction above the value of forty ſhillings.

The ſecond way whereby the county courts were broken, was by appointing the juſtices in *Eyre*; theſe were appointed in the twenty-ſecond year of *Henry* the ſecond, and were judges that ſat in the ſeveral counties to hear and determine cauſes, as well criminal as civil; and theſe proceeded in the ſame method of judicature as was obſerved in the King's court, and kept an uniformity in the law,

law, which was very much broken by the diſtinct courts of juſtice, that before had tranſacted all civil buſineſs in their ſeveral counties; from hence, afterwards they began to grant commiſſions to take aſſizes, which which were commiſſions *pro re nata* upon complaints of diſſeiſens done in their ſeveral counties.

The King's own court conſiſted of the Juſticier, who was the chief officer of ſtate, and the Chancellor or keeper of the ſeal, and ſuch other Barons and Tenants *in capite*, as the king called to their aſſiſtance; theſe were called by writ to the determination of particular cauſes, and tho' towards the latter end of the firſt *Norman* period, there were ſome great officers of ſtate that were conſtantly reſident, yet the King according to the weight of the cauſe, called ſometimes more and ſometimes leſs in number; and by vertue of ſuch writs they ſat and tranſacted all civil

buſineſs. This court of the King tranſacted all civil and criminal pleas, as likewiſe the matters relating to the revenue; theſe when they ſat as a court of revenue reſided in the Exchequer: when they ſat on criminal and civil cauſes, they ſat in the hall of the king; when they ſat in the Exchequer the treaſurer generally preſided as a man beſt skilled in the revenue; when they ſat as a court of criminal or civil, the Juſticier preſided as a man beſt skilled in the law; when it was a matter of great moment, as upon the levying a new war, or raiſing an Eſcuage, moſt of the great perſons that held *in capite* were called, and here they tranſacted all manner of buſineſs as well criminal as civil relating to the revenue; and this was called, the *commune concilium Regni*, or the parliament, as to this court afterwards the repreſentatives of boroughs that held *in capite* were called; this was the great court baron of the kingdom;

and

and when they ſat, all leſſer courts and councils ſeemed to be ſuſpended, but theſe were ſeldom called during the firſt *Norman* period, becauſe ſuch concourſe was formidable to thoſe princes: but leſſer councils to tranſact the public buſineſs were very frequent amongſt them; all the pleas that were depending in the courts of the King, or of the Exchequer, were put before them, ſave only that inqueſt of offices that were not tranſacted, and the common extracts upon which proceſs went, were not brought before them, becauſe theſe being matter of courſe, remained as before in the Exchequer.

In the barons wars, the power of *Hugo de Burgo*, who was the Juſticier, was turned againſt the King, and it was found likewiſe, that the Barons who had granted diſtricts were very troubleſome to the crown: for tho' in the Conqueror's time, and for ſome reigns after the conqueſt, they were

were kept in very good ſubjection, and the *Norman* and *Engliſh* Barons were a balance one for the other, the *Normans* being dependants upon the crown who had new planted them in the kingdom: but afterwards time wearing away the diſtinction, the *Normans* grew up *Engliſh*, and became fond of thoſe liberties and privileges that the *Engliſh* had enjoyed in the *Saxon* times; and from whence grew the Barons wars, which introduced a new policy in the kingdom, which hath continued with ſome alteration unto this day; and for this purpoſe after the battle of *Eveſham*, in the time of *Henry* the third, there ſeems to be ſome of the wiſeſt policies ſet on foot that have ever been known in any nation; for, firſt, after the conqueſt, the King confirmed the great charter which made him very popular, by making ſo good an uſe of his conqueſt as not to graſp at the liberties of the people.

The

The next ſtep that was taken, was that of forming a balance to the great peers, by breaking the territories that were eſcheated into ſmaller diſtricts to hold immediately from the crown, from hence the diſtinction between the *Barones majores*, and the *Barones minores*; the *Barones majores* were thoſe that had the greater diſtricts, and the *Barones minores* were the new Tenants *in capite*, that had the ſmaller territories; and becauſe the number of the *Barones minores* was too great to be called together at the aſſembly and conventions of the ſtates: they took a new method to balance their power againſt that of the ancient baronage.

Such ports and boroughs as had held *per Baroniam*, were anciently ſummoned to parliament and ſent their repreſentatives to ſit with the baronage, becauſe they were equally concerned in the taxes and levies of the kingdom, with the reſt of the

the *Barones minores*, holding then about as large a quantity of land in the county as amounted to a barony. they likewiſe ſent their repreſentatives both of counties and boroughs, which as ſome have ſaid, were digeſted into one houſe, but I believe they were originally formed into two, as they are at preſent; from hence the writ is, that they ſhould chuſe *Duos milites gladiis cinctos*; and from hence afterwards the taxes and levies were given in the lower houſe, becauſe the ports and boroughs were trading parts of the kingdom, and the Barons of theſe ports ſettled the ſeveral cuſtoms and taxes that were raiſed to the uſe of the navy, and as the baronage that held *in capite* to accompany the King in his wars, were ſummoned to a parliament to aſſeſs the Eſcuage; ſo the Barons of the ports and boroughs were ſummoned to the King's court to ſettle the tillage, for there were two diſtinct tenures in the kingdom, that

ſeem

ſeem to have had oirginally charters from the Conqueror, the military Barons that were uſed to accompany the King in the wars, and the Boroughs which uſed to maintain the navy. And there was alſo a third ſort, which were the antient demeſne lands, which uſed to maintain the table of the King. As to the tenants in antient demeſne, they generally uſed to bring in their corn or gabel rent in ſpecie to the Exchequer: theſe that held in Burgage tenure, were uſed to preſent particular donatives to the King, upon particular expeditions. Theſe laſt were often ſent for and conſulted in foreign expeditions where the navy was concerned.

Theſe burgage tenures were various according to the different nature of their patents; for ſome held at a certain rent, others to fit out ſhips for the navy. But the moſt general way of infeudation was by certain rents. And as the tenants *in ca-* Maddox Rol. ab.

pite that held by military ſervice, were often ſummoned to give aid to the King, over and above their military duty: as aid to the King's ſon, or to marry the King's daughter; ſo thoſe that held by burgage, were ſommoned when the King deſired a donation, and donatives were then given in the King's courts, for each particular borough, and they were then regiſtered and accounted for by the Sheriff; and this was over and above their conſtant rent and ſervices paid for ſuch boroughs under the name of tallage.

But towards the period we have mentioned, all the repreſentatives of the burgage tenants, and the repreſentatives of the *Barones minores*, were caſt together in one houſe. And as the military Barons in former times gave their aids apart upon every Knight's fee, and the burgage tenants gave their donatives in part ſo much upon every borough; upon the

the coaleſcence of the *Barones minores* and the burgeſſes into one houſe, they fell into a new way of taxing which was by way of ſubſidy: as the tenth penny of every man's ſubſtance, which they called Diſmes, and the fifteenth of every man's ſubſtance which theſe called *Quinzimes*. Theſe were raiſed by particular laws, and were gathered by diſtreſs according to the value of every man's ſubſtance, and at the time when every man's perſonal ſubſtance was viſible. I find in *Reily* 516, a writ to the Clergy for the gathering their tenths, and that they themſelves ſhould appoint collectors. And it ſeems that books were kept by the crown, of the ſtate and condition of the Clergy and Laity when theſe taxes was collected.

But becauſe the commons ſitting by right of repreſentation, could give no more than they were impowered by their principals, therefore all tax-

ation uſed to begin in their houſe; neither would they ſuffer it ever to be altered, becauſe they looked upon that to be a breach of truſt in not conforming to the original inſtructions they received from their principals. This ſeemed to be taken from the cuſtoms of the ancient boroughs, who were intruſted to give a particular ſum for every particular borough. And they did not immediately leave that way of taxing afterwards, when they came into a more general way of taxing by tenths and fifteenths, for they uſed to conſult their principals, as they had formerly done, what they could bear; and when once by conſultations together they had formed one general ſubſidy, they would never ſuffer it to be touched by the ſuperior baronage. This gave the power of the purſe to the commons, which as it gave an opportunity to the crown to gather great ſums off the people, ſo it made them a balance for the antient baronage,

nage, and in after-times even too great for them.

But the power of judicature was reſerved to the antient baronage, or the *Barones majores*. This ariſes from the hiſtory already mentioned, for the *Barones majores* were generally the perſons who were ſummoned for the hearing the cauſes, and theſe as well eccleſiaſtical as temporal. And in the antient times, chiefly eccleſiaſtical great cauſes were generally heard by them, as well originally as by appeals, as may be ſeen plainly in *Reily's Placita Parliamentaria*. Where likewiſe we find many inſtances of original cauſes, referred to inferior courts that were of no great moment. But all petitions againſt great perſons, and the Prince's officers were heard in this court. From hence this became a place of original juriſdictions for impeachments, which were preferred either

either by private perſons or by the whole Commons of *England*: and likewiſe the *dernier reſort* to correct the errors of inferior judicatures; but as to original cauſes they began to refer them to the inferior juriſdiction, to avoid a multiplicity of that ſort of buſineſs, as may be ſeen in *Reily*'s *Placita Parliamentaria*, 156, 157. And when any matter of fact was to be tried, there uſed to go out writs to the Juſtices in Eyre, to ſummon the parties before them, to try the fact according to the command of the writ, as may be ſeen in *Reily* 74, 75.

The next policy that was introduced after the wars with the Barons was that of breaking the power of the Juſticier into ſeveral courts, which make the ordinary juriſdictions that are now in being; (that is to ſay) the Chancery, the King's Bench, the Common Pleas, and the Exchequer.

Firſt,

Firſt, as to the Chancery; and that had a four-fold uſe; firſt as an *Officina brevium*, ſecondly, as a comptrol and cheque upon the court of Exchequer, and thirdly, as a *Latin* court for the proceeding on the records there touching perſons privileged, fourthly, as a court of Equity.

1. Firſt, as an *Officina brevium*; antiently the Maſters in Chancery made out all ſummonſes to parliament, and the writs for the Common Pleas to proceed upon. But after the *Magiſtri Cancellarii* had ſettled proper writs and commiſſions, and thoſe things began to be of courſe, then had they proper under officers, which made out their writs of courſe, and they began only to at tend the making out of the new writs in extraordinary cauſes, and the ordinary writs and commiſſions were made out by the proper officers. Hence it came to paſs that the officer called the Clerk of

of the Crown made out all ſtate commiſſions, after the form of them were ſettled; as commiſſions for Juſtices Errant, and of aſſizes, general goal delivery, *Oyer and Terminer*, and of the peace, writs of aſſociation and *didemus poteſtatem*, for taking of oaths, and all general pardons and ſpecial pardons; alſo writs of execution upon the ſtatute ſtaple, which were annexed to this office, in the time of Queen *Mary* for their continual and chargeable attendance. All which writs were made out by the Curſitor. The Curſitors were formerly as clerks to the Maſters who made out the writs and were afterwards ſettled into a diſtinct office to make out the *Brevia de Curſu*. There were likewiſe in this court clerks of the *Hamper*, who did regiſter fines that were paid on every writ, and ſaw that they were ſealed up in bags in order to be opened afterwards and iſſued and the Comptroler who attended and inſpected the opening of the

the bag, in which the writs were put and was a cheque upon the clerks of the *Hamper*.

The reaſons of the inſtitution of this *Officina Brevium* are many; firſt that it might appear, that all power of judicature whatſoever flowed from the King, and therefore there was a ſummons even to the Peers in parliament, that ſat *in Jure proprio*; ſo likewiſe for the lower Houſe of Commons, the baſis of the ſame was made by writs that iſſued out of this court, and were returned into the ſame office; and alſo in every judicature there were particular patents which ſhewed the extent of their commiſſions, and that their power was derived from the crown.

Another reaſon for this inſtitution was, that the crown might have their proper fines. Theſe were antiently paid to purchaſe juſtice from the crown; for they would not ſuf-

fer perſons to come into the King's courts, and engage the power of the King, to do right to private perſons, without firſt receiving ſomething from the ſubject towards the charges of the court, and the expence of the Judicature. Inſomuch as in the ancient times the King uſed to ſummon ſeveral of the Barons to attend the hearing of ſuch cauſes; but afterwards by *Magna Charta*, theſe were reduced to fines certain, that the Crown might not be defrauded, and the writs were taken out of the court of Chancery, returnable in the other courts, that one court might be a cheque to the other.

A third reaſon of this inſtitution was, to keep an uniformity in the law; for whether theſe writs went out to the Sheriff in nature of a Juſticies, or whether they were returnable before the Juſtices in Eyre, or Juſtices of the Common Bench or Aſſize,

Aſſize, they were ſtill made in one form according to the nature of the complaint, which was both a direction to the Judge and a limitation of his authority.

2. The ſecond office of the court of Chancery was that of a cheque upon the court of Exchequer. The Sheriffs, the Eſcheators, and all other officers, relating to the revenue were ſworn in the Exchequer: and when they *virtute officii* took any inquiſition, of the death of any perſon, of the lands of which he died ſeiſed, they uſed to return it into the Exchequer.

But the Chancery in order to quicken theſe officers would iſſue writs, and when they took any inquiſition *Virtute brevis*, they were wont to return it into the Chancery. But to underſtand the authority of the court of Chancery in relation to the revenue, and what ſhare of ju-

riſdiction was ſettled in that court upon the diviſion of the courts of juſtice, it will be neceſſary to look into what was the uſual buſineſs of the Chancellor in the firſt *Norman* period.

In the ancient times the Chancellor was likewiſe Chaplain to the King, and it was his buſineſs in the time of the Juſticier to write the *Diplomata*, that is, all charters and commiſſions from the King. Therefore when the power of the Juſticier was broken, he obtained the *Officina Brevium* and *Cartarum Regiarum*. From thence all the extraordinary juriſdictions touching granting of charters, as likewiſe all inqueſts of office to intitle the crown, were returned into this office. And the Exchequer, in which theſe things were anciently tranſacted, became only an ordinary court of revenue to let leaſes to the King's farmers, and to get in the King's debts. And therefore

therefore the office in the Exchequer was only an office of inſtruction, of what lands were in the King's particular counties. But to veſt lands in the crown *de novo*, it was neceſſary to have an office under the great ſeal, and ſo to grant lands from the crown, (unleſs it were merely the farms that were granted for years) it was neceſſary they ſhould have patents under the great ſeal.

5. Co. Page's caſe 52

From hence when any writ went out of the Chancery in order to quicken the Sheriffs and Eſcheators, it was returned into that court as part of the extraordinary juriſdiction that fell to the ſhare of the Chancellor after the diviſion of the courts, and there any party grieved was to come in to traverſe. And ſo if a *ſcire facias* iſſued to repeal any patent it was returnable into this court, becauſe there ſuch patents were regiſtred, and there the party came in and pleaded before the Chancellor.

And

And if a demurrer was joined the Chancellor was judge. But if they pleaded to iſſue, the Chancellor could not award a jury proceſs, but was to carry the record itſelf over to the King's Bench, who awarded the jury proceſs upon it; and afterwards upon the verdict gave judgment. And the reaſon of this ſeems to be, that the Chancery being the *Officina Brevium*, if he could have tried iſſues might have eaſily encroached upon other juriſdictions, in making the writs that were iſſued out of his court returnable into it. And from hence it was that they kept original and judicial writs diſtinct from each other. For tho' the Chancery gave judgment upon ſuch inquiſitions, and upon a *ſcire facias*, where a demurrer was joined, yet ſuch judgment was either to remove the King's hands, or to repeal the patent, upon which no judicial writs needed to iſſue.

3. Thirdly

3. Thirdly, the ſaid juriſdiction was as a *Latin* court for the proceeding on the records there, touching perſons privileged, and alſo upon recognizances.

As to the privileges of officers, this was plainly ariſing from their attendances. And their juriſdictions in recognizances aroſe from the records remaining with the Chancellor here. And becauſe they had in the former caſes uſually given judgment in demurrer, ſo in this caſe, when demurrer was joined they gave judgment alſo. But they never having iſſued any jury proceſs in the caſes of revenue, in the old *Norman* times, ſo in theſe privileged caſes they iſſued no jury proceſs, becauſe they had never done it in the caſes of the revenue.

Theſe two laſt juriſdictions in the Chancery, making up what we call the

the petty bag. And whereas all the original writs that were the foundation of all the buſineſs in the courts of juſtice, were put together in the *Hamper*: ſo the writs that went out to return inquiſitions into the Chancery, were returned into the petty bag; which gave the diſtinction to thoſe names and begot diſtinct officers in the court.

Fourthly, of the Court of Equity.

This court was newly erected after the diviſion of the courts, and from very ſmall and inconſiderable beginning, hath not only curbed the juriſdictions of the common law, but hath introduced a new proceſs, and a new manner of tryal totally before unheard of. And which tho' it was very much impugned even towards its firſt original creation, yet could never be remedied, and is now grown to that degree, that it has ſwallowed up moſt of the other buſineſs

of

of the common law courts, we muſt therefore ſee what footſteps there were for this juriſdiction in the ancient *Curia Regis*. And that there muſt be ſome footſteps for an *Engliſh* proceeding to give occaſion and riſe to this court, ſeems to be plain, from the *Engliſh* juriſdiction in the court of Exchequer, as well as that which is exerciſed in the court of Chancery.

There was no doubt, a power in the ancient *Curia Regis*, upon *treaſure trove*, or goods detained from the King, to ſend to the party by a *venire facias*, and examine him upon articles adminiſtered to him upon oath. We find this new practice in *Engliſh* informations in the King's behalf in the Exchequer, and likewiſe upon impeachments in the Houſe of Lords, where articles are exhibited in *Engliſh* for the parties to anſwer. But in the court of King between party and party, the pleadings were in *French*, and afterwards Regiſter 24.

entered upon the roll in *Latin*; and they were entered thus in *Latin* [before the ſtatute of 28 *E.* 3.] to keep a memorial of what was done in the courts of juſtice, which they thought could not be done in changing and fading languages. When the party came in, he anſwered to ſuch articles, and if he diſcharged himſelf upon oath, he was acquitted; but if they proceeded againſt him by witneſſes, it was upon *Latin* informations, where they always deſcended to iſſue. And there was no more to warrant this juriſdiction in the ancient *Curia Regis*.

At the firſt diviſion of the courts, the Chancery was very tender in making out of writs, in caſes where there had been formerly no precedents, in the ancient *Curia Regis*, which now are called *Actiones Nominatæ*. Becauſe they thought the ancient footſteps that were in former courts of juſtice, were the bounds of

of the law, therefore whenever there was a new caſe, that ſeemed to require remedy, the ordinary juriſdiction referred them to petition the next parliament, where proper remedies were given for the peculiar caſes. But becauſe this multiplied petitions to parliament, there was a peculiar law made, by which it gave the court a power in a new caſe to invent a writ, which is the *Stat. Weſtm.* 2. *cap.* 24. *Et quotieſcunque de cætero evenerit in Cancellaria, quod in uno caſur eperitur breve, et in conſimili caſu cadente ſub eodem jure, et ſimili indigente remedio, non reperitur, concordent Clerici de Cancellariâ in brevi faciendo, vel attermineni querentes in proximum Parliamentum, et ſcribantur caſus in quibus concordari non poſſunt & referant eos ad proximum Parliamentum, & de conſenſu juriſperitorum fiat breve; ne contingat de cætero, quod curia Domini Regis, deficiat* 2 Inſ. 405.

conquerentibus in juſtitiâ perquirendâ.

Tho' the Chancery by this ſtatute was armed with great power, yet the officers there uſed it very modeſtly, only to grant juriſdiction to other courts upon writs in new caſes; and for this the writ of entry in *conſimili caſu* which relating to lands, was by way of eminence ſaid to be founded upon this ſtatute. There were likewiſe founded upon this ſtatute actions upon the caſe, upon ſeveral treſpaſſes, in which caſes there were not found any writs in the regiſter. But towards the times of *Richard* the ſecond, they not only made uſe of this ſtatute for the making of new writs, but for the enacting a new juriſdiction; and the occaſion was this. The making the ſtatute of *Mortmain* had curbed the growing power of the clergy. They afterwards found out an invention to avoid the ſtatute by giving away of lands,

lands to truſtees for pious uſes, and the Feoffees of ſuch truſt did the duty of ſuch tenure in behalf of the truſt; but if they perverted the truſt, the ordinary juriſdiction could take no notice of it, as being againſt the ſtatute of *Mortmain* ſo to do: but *John Waltham*, then Biſhop of *Salisbury*, and Chancellor, (as the Commons mentioned in their petition) out of his ſubtilty found out and began a novelty againſt the form of the common law, and that was the invention of the writ of ſubpæna. This writ ſummoned the party to appear under a pain, to anſwer to ſuch things as were objected againſt him: and a petition was lodged in Chancery containing the articles to which he was obliged to anſwer, and upon ſuch articles was it that this new invented writ iſſued. But the *7 R. 2. cap. 6.* was made to hinder the growth of this court, by which damages were given to ſuch perſons that were drawn into Chancery,

cery, or before the King's Council, upon ſuch falſe ſuggeſtions.

2 Hen. 4. 69. 4 Hen. 4. 78. 3 Hen. 5. 46.

There are petitions of the Commons againſt this new invented juriſdiction. But when they had ſettled this new proceſs of ſubpoena, in order to make the party appear, they took the whole proceſs that had been uſed in Parliament, in order to bring perſons to anſwer charges exhibited before them. That is, the attachment whereby they took up his body as a contempt for not appearing, the proclamation commanding him to appear upon pain of his allegiance, and likewiſe to attach his body wherevet he was found, either within liberties or without. The next was a commiſſion of rebellion, which recited the proclamation and ordered the perſon to be taken up whereever he was found: and likewiſe a command to all conſtables and bailiffs to aſſiſt the Sheriff. Theſe were all directed to the publick miniſters and officers of juſtice, and plainly appeared

appeared to be the ancient prerogative proceſs to compel an appearance in the ſupreme court of judicature.

If theſe three proceſſes did not fetch in the party, it was preſumed there was ſome negligence in the officers and miniſters of juſtice, and therefore the ſupreme judicature ſent an officer of their own, to ſee whether the party did really hide himſelf from juſtice, or not; and if the officer returned that he did, then iſſued out a ſequeſtration upon all his lands, goods, and chattles whatſoever; theſe are the two laſt prerogative proceſſes: and long it was before the court of Chancery could fix them to ſubſerve the juſtice of that court. For the courts of common law ſo far impugned the ſequeſtration, the laſt prerogative proceſs that they held, if the ſequeſtrators were reſiſted by the party and killed, that it was no murder, but only *ſe defendendo*; for that the Chancery had no juriſdiction in *rem*, but only in *perſonam*.

2 Chancery caſes. 44. Cro. Eliz. 651. Brograve a Watts.

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The court of Chancery being thus erected to iſſue proceſs, and the Chancellor or Lord-keeper that having the government of that court, had the great ſeal, by authority of which all proceſs was to iſſue: from hence it was, that there were Maſters appointed in that court, that made out the forms of the writs, and entered them in a book kept up for that purpoſe, thence called the regiſter, and ſuch writs are precedents for the future in like caſes. And exceptions were taken to writs in the courts to which they were directed, for not agreeing with the regiſter, and for divers other informalities, becauſe ſuch informal writs raiſed a preſumption that they did not iſſue out of the great ſhop of juſtice, from which all courts ought to found their authority in civil Pleas.

By the ordinary juriſdiction on every cauſe of complaint, the Chancellor iſſued the writ after examination

nation of the plaintiff, that the ſubject might not be needleſly diſturbed; but when the caſe was extraordinary and it was neceſſary to have the defendant's own oath, the Chancellor by his extraordinary juriſdiction, had power to ſend for and examine upon the ſeveral allegations in the plaintiff's petition, and this gave birth to the *Engliſh* juriſdiction of the court of Chancery.

By the ordinary juriſdiction, on every cauſe we ſee that in the times of *Ed.* 1. they began to keep cloſe to the forms of the regiſter; ſo that the ſtatute of *Weſtm.* 2. *cap.* 24. was made to enlarge the ordinary juriſdiction only. For it was then doubted whether the Chancellor could go beyond the ſettled forms of the writs, becauſe the Chancellor was obliged to follow the law, and was not intruſted with the power to innovate and make new laws; but this ſtatute only gave power to the Chan-

cellor to make out new writs, where he found ſimilar caſes, therefore the extraordinary juriſdiction where there was no like caſes, or where the party was to be examined upon oath, was left as it was before.

The ſubpoena is the firſt proceſs in the court, in order to bring in the party to anſwer.

The ſubpoena was anciently and originally a proceſs in the courts of common law, in order to bring in a witneſs to atteſt the truth; and it was a ſummons to the party under a penalty to appear and give his teſtimony. This proceſs was therefore taken up by the High Court of Chancery, when a man was convened to anſwer upon oath, as to the truth of the plaintiff's allegations, becauſe it was the neareſt proceſs that was uſed in caſe of atteſtation by the common law.

And

And this was formed after the manner of citations by the civil and canon law; in which it was neceſſary to inſert the names of the defendants and alſo of the plaintiffs, at whoſe ſuit, and at what time and place they were to appear.

The return of the ſubpoena is either ordinary or extraordinary. Firſt ordinary; which is at any day certain within the term. For ordinarily no ſubpoena is returnable in the vacation, the reaſon of which is the ſame as that on which depends the conſtitution of the terms, which is very well deduced by *Spellman* in his remains. For anciently the King's courts were open from three weeks to three weeks, all the year long, as the courts of other inferior Lords, for their tenants and vaſſals: but after the Conqueſt, when buſineſs began to multiply in the King's courts, and the days and times of devotion,

and the time of harveſt were ſet apart as *dies non juridici*. Therefore *Hillary* vacation was appointed for *Lent*, *Eaſter* vacation, for the time of *Witſuntide*, and the preparation for it, and *Trinity* vacation for the harveſt, *Michaelmas* vacation for *Chriſtmas*. And the vacations being thus fixt for the times of devotion and country buſineſs, it was thought fit not to diſturb the people any more by the extraordinary juriſdiction, than by that of of the common law. Secondly, the extraordinary return is made immediately, and in the time of vacation. This by ſpecial petition, or motion, to to my Lord Keeper, and an affidavit that the party lives in town, or within ten miles of it. And this is excepted out of the general rule, becauſe not within the reaſon of it. For the parties near the court, could not be diſturbed or brought from their country buſineſs by ſuch attendance, and the corporation courts

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in cities were open all the year long; and therefore it was fit that the court of Chancery ſhould be open to all the parties that dwell within a convenient diſtance from the town, that the juriſdiction might be as extenſive as that of any court whatſoever. But no ſubpoena is returnable immediately in the term time, becauſe you may have it returned at any day certain, as ſoon as you pleaſe, the *immediate* ſuppoſes an urgent neceſſity for an appearance, which cannot be in term time, where the time of appearance is every day. Pract. Reg. 340.

Miſtakes in the ſubpoena vitiate the writ. Firſt, in the name of the parties; for if the parties ſerved be not named in the writ, there was no authority in the court to convene him, and therefore it was no contempt in the party not to appear. And therefore if an attachment iſſues upon ſuch ſubpoena, upon application to the court it ſhall be diſcharged.

Secondly,

Secondly, in the return; as if it be taken out in term, returnable at no certain day; for the party is at a loſs when to appear, and therefore there is no contempt in not obeying it.

Thirdly, in the form of the writ; for if the form of the writ be miſtaken, it cannot be preſumed even in the court to which it is returnable that it iſſued from thence, and therefore the ſubject ſhall not be obliged to take notice of it.

There can be no more then three defendants put into one ſubpoena. The reaſon is to prevent the vexations of plaintiffs. For if it were equally cheap to put in a multitude of names, the plaintiff might put in abundance of defendants, in order to terrify and vex them; for it is ſome ſmall inconvenience for a man to hear that there was proceſs out againſt him, tho' he be never ſerved, and

and yet if not ſerved, he cannot be repaired in coſts from the plaintiff. And they were alſo confined to the number three, to prevent the miſtakes which the tranſcribing a multitude of names in the label might occaſion.

The husband and wife are taken together but as one of the three, becauſe they are as one perſon in law, and the property totally in the huſband.

If there be two in the ſubpoena, it coſts three ſhillings, if three, three ſhillings and ſix-pence. The charge of the ſubpoena ought for reaſons aforeſaid to ſwell in proportion to the number of the defendants. And if there was but one in it, it was two ſhillings and ſix-pence before the ſtamps in *England* increaſed it.

Where there are many plaintiffs they need not all be named, but only

A. B.

A. B. et al. ſince that is ſufficient notice to the defendant to appear, for the appearance to *A.* and *B.* will be an appearance to the reſt.

The label is a ſhort copy of the import of the ſubpoena, as it relates to each particular defendant, therefore if the label and body do not agree, the party ſerved may take advantage of it; for it is no contempt in the party not to appear if he be not ſerved with the ſubpoena itſelf, or a true copy of it: and the label is not a true copy of the ſubpoena, if it doth not agree with the writ itſelf.

As to copies, it is to be known that when the defendant is to appear, there muſt be a ſubpoena left with him or the copy of it. But when there are only interlocutory orders in a cauſe, then 'tis enough to ſhew the order, and that is notice ſufficient. For the clerks of the court

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are ſuppoſed to be reſiding in court, and therefore upon notice of ſuch a cauſe, they may conſult the original in the minutes. But if the order directs notice, ſome have ſaid they muſt leave copies.

The ſervice of the ſubpoena, if it contains one defendant only, is by delivering the body of the writ, firſt to the party himſelf, and this is a perſonal notice. Secondly, by leaving it at his dwelling houſe, with one of his family; or if he hath no houſe, at the place of his uſual reſidence. And this was held a good ſummons at law, in a writ of debt and in all real actions, becauſe it was preſumed, that a man muſt have notice in his uſual place of abode, and if ſuch notice ſhould not be ſufficient, it would be eaſy by keeping out of the way to eſcape the extraordinary juriſdiction. Booth 5.

If there be more than one Defendant in the ſubpoena, you muſt deliver

the label to the firſt, and ſhew him the body, ſo to the ſecond, and reſerve the body to the laſt, becauſe the label will not appear to be a true copy unleſs the ſeal of the court appear on the body; and unleſs the ſeal appear, which is the enſign of the authority, no man need pay obedience to the meer written label.

If the ſubpoena be againſt huſband and wife, and either the huſband or wife alone be ſerved, 'tis good ſervice of the other, becauſe they are the ſame perſon. Their property is the ſame, and therefore in a cauſe here againſt husband and wife, if one be ſerved, 'tis preſumed to be a ſufficient notice to the other; and tho' the husband appears, yet for want of an appearance for the wife, an attachment will iſſue againſt both, inaſmuch as it is a contempt in both, if the wife doth not appear as well as the husband, ſince the

the husband ought to take care to order an appearance for his wife.

If two perſons commence a ſuit beyond the ſea to arreſt the plaintiff's goods at *Leghorn* by order of court, the ſervice on one defendant here may be ſervice on the other beyond the ſea. Both joining in the ſuit beyond ſea, are looked on in the cauſe but as one perſon, and by conſequence they are to be looked upon here but as one perſon, they being in this matter the ſame in intereſt.

Love a Baker, 1 C. C. 67. Nel. C. R. 103.

The ſubpoena muſt be ſerved before noon of the laſt day of the return. For after the return day it cannot be ſerved, becauſe that is the time for appearance; and it cannot be a contempt not to appear when you have no notice to appear, till by the mandate of the writ you ought to be in court. And it muſt be ſerved before noon of

the laſt day of the return, for the Six Clerks ſit but till noon, and then ſtrike the time in their books, and the afternoon is reckoned into the next day; for by the ancient accounts of the juriſdiction of courts, the juridicial time was only in the morning.

The ſervice is good in the night, or on *Sunday*, if it be before the time of the return; for this being only proceſs of notice, and not to arreſt the parties, it can create no diſturbance, tho' it be ſerved in the night, or on *Sunday*.

If injury be done on the party that ſerved the proceſs in word or deed, or the authority of the court contemned, upon affidavit and motion, the party ſhall be committed by attachment, for it is againſt the dignity of the court to ſuffer ſuch contempt. And the rather, becauſe the proceſs is executed by private parties,

parties, and not by public officers: for no private man would ſerve the proceſs if he was not to be vindicated from obloquy and contempt.

The bill was originally before the iſſuing of the ſubpoena, and was a petition for it.

And there being a deviation from this practice, that proved burthenſome to the ſubject 'tis enacted by 4th and 5th of Queen *Ann. cap.* 16. that no ſubpoena or proceſs for appearance, ſhould iſſue till after the bill is filed with the proper officer in the courts of equity, unleſs in caſe of bills for injunctions to ſtaywaſte or to ſtay ſuits at law, and a certificate thereof brought to the ſubpoena office under the hand of the Six Clerk.

If a bill be exhibited grounded on the loſs of a bond; as it is the loſs which intitles the court, to the juriſdiction of the cauſe, affidavit muſt be made of it; for if it is not loſt, the remedy is at law. 1. C. C. 231.

If the bill be for the diſcovery of a deed, and prays relief, there the plaintiff muſt make affidavit that the deed is not in his cuſtody. The reaſon is, becauſe every man's deed is pre-

preſumed in his cuſtody, unleſs the contrary appears. And then the intention of the bill ſeems to be only to inſnare the defendant, by forcing him to ſet out the complainants deed upon oath. But if the bilㅣl be merely for the diſcovery of the plaintiff's deed, and prays no relief, there need be no affidavit; becauſe no man ſhall be preſumed to exhibit his bill merely for diſcovery of a deed, where it is not really loſt, and where he muſt pay coſts for ſuch diſcovery.

1C. C. 11.

But this is to be underſtood with this diſtinction, that where there can be no relief upon the deed at common law, but the relief is only in a court of Equity, there the plaintiff may make the defendant ſet forth the deed, and alſo pray relief thereon without any affidavit: as where *Ceſtui que truiſt* comes againſt his truſtee. Becauſe there the relief being only in Equity you cannot by a demurrer cover that relief. But if

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the demurrer only covers the ſetting out the deed in *hæc verba* upon oath, there where there is no affidavit the demurrer will be allowed, becauſe the defendant is not obliged to ſet forth the deed in *hæc verba* upon oath, unleſs it appears that the plaintiff hath it not in his cuſtody, which is to be done by affidavit.

If the bill be ſcandalous or impertinent, it may be referred to the maſter to tax coſts on the council, and this is to keep the pleadings modeſt and ſuccinct.

If there be no council's hand, or if it be counterfeited, it may be referred to the maſter and coſts taxed, or it may be diſmiſed upon demurrer, or by order be taken off of the file. The original of councils hand, ſeems to be, that the extraordinary juriſdiction might not be troubled but where there is not a relief at law. Beſides originally the court examined theſe petitions or *Engliſh* bills. But when

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by reaſon of the increaſe of buſineſs the pleadings became too numerous, the court referred them to the honor of the bar, that they might not be troubled impertinently.

The ſubpoena is to attend the extraordinary juriſdiction to anſwer the complaint of the bill, and not to appear at the return of the ſubpoena, is a contempt of that juriſdiction.

About the 16th of *Elizabeth*, they introduced the practice of writing a letter to the Peer, before they iſſued a ſubpoena, upon preſumption that a Peer would pay obedience to the mere letter of the Chancellor. Or elſe it was founded upon a reſpect that they thought due to the Peerage, engaged in public affairs, that they ſhould have notice before the proceſs iſſued. Eſpecially becauſe they having a numerous attendance, it might be inconvenient, that they ſhould incur a contempt from a proceſs

ceſs ſerved in the common method, by giving it in their houſes to one of their ſervants.

If a Lord doth not appear upon the letter, a ſubpoena upon motion is to be awarded againſt him, becauſe no ſubſequent proceſs can be formed but upon a contempt to the great ſeal, which is the royal authority, and the contempt will not ariſe merely from the Chancellor's letter, which is *ex gratiâ*, and therefore if he did not appear on the letter, the ſubpoena iſſued.

Records of Chan. in Mſs. 14 Eliz. Selden's Baronage, 155, 156, 157. Dal. Rep. 83.

If on the ſervice of the ſubpoena the Peer doth not appear, or if he did appear, and did not put in his anſwer, they anciently iſſued an attachment, but the attachment was condemned in the 14th of *Elizabeth* in parliament, and reſolved that no attachment lay againſt the perſon of a Peer, becauſe his perſon cannot be impriſoned. After that

they proceeded againſt Peers by ſequeſtration, and therefore the motion is for a ſequeſtration unleſs cauſe. And this was regularly made upon affidavit of the ſervice of the letter and the ſubpoena. Tho' ſometimes it is moved without: ſince the peer may ſhew want of ſervice at the day aſſigned to ſhew cauſe why the ſequeſtration ſhould not iſſue. And the order of the ſequeſtration is never made abſolute, without an affidavit of the ſervice of the order, to ſhew cauſe, and a certificate of no cauſe ſhewn.

If the defendant is within 40 miles of the town, he is to appear within four days after the return of the ſubpoena: if he is above 40 miles he hath eight days to appear. By the
Bracton. ancient common law they fixt 20 miles to be a *dieta* or a day's journey, ſo that they allowed by the indulgence of the extraordinary juriſdiction, double the time that according

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to the notion of the common law might be conſumed in the journey.

If in an injunction-cauſe, where the ſubpoena iſſues before the bill is filed, the bill is not filed on the third day after the return of the ſubpoena, the defendant is diſcharged with coſts, becauſe there is nothing for the defendant to appear to anſwer to, and therefore he muſt be diſcharged from his attendance, with the coſts that ariſe from ſuch unneceſſary vexation.

The coſts uſually taxed are ten ſhillings, unleſs upon affidavit the court think fit to refer it to a maſter, by reaſon of any extraordinary charge and trouble ariſing to the defendant: and for ſuch coſts the defendant may have a ſubpoena commanding payment. For tho' the plaintiff hath abuſed the proceſs by taking out the ſubpoena without bill, yet he ſhall not be forthwith attached as for a con-

tempt, becauſe the original ſubpoena is preſumed to iſſue upon a bill filed, and therefore ſince the court thought fit *ex gratia*, to relax that practice, the plaintiff is not in contempt till he diſobeys the order which commands him to pay coſts, and by conſequence he muſt have notice of that by a ſubpoena.

The original ſubpoena is a ſummons to the party himſelf that is defendant, wherefore not to appear, in reaſon is juſtly accounted a contempt of the court. And in ſuch caſe, an attachment iſſues to the Sheriff to take him up. In this Chancery proceſs differs from the proceſs at common law. For there the writ, which is in the nature of a ſummons, is directed to the Sheriff, and the Sheriff anciently made his return upon it, either *ſummoneri feci*, or *nihil habuit in balliva mea per quod ſummoneri poſſit*; here the plaintiff makes affidavit of the ſervice of the

the ſubpoena at the affidavit office, and then the attachment iſſues of courſe under the great ſeal. Becauſe the ſummons is in nature of an order to attend the extraordinary juriſdiction, and all other proceſſes iſſues on a ſuppoſition of diſobedience thereunto; but if the ſummons had been to the Sheriff, it had been only a contempt ſhewed to a miniſterial officer in not paying obedience to him, and not to the court itſelf. Beſides at common law if a writ were directed to the party himſelf, that might have been ſmothered, and it would not have laid any foundation for any other court to proceed upon it. But when the power of the Juſticier was broke, they gave the Chancery a power to iſſue the writs, and the other courts authority to proceed upon them, and therefore theſe were neceſſarily directed to the Sheriff, that they might be returned to the other Courts. But in the Chancery and Exchequer where the ſame courts

iſſued

iſſued the proceſs, where the appearance was to be, the firſt proceſs was directed to the party, that it might be left with him, or at leaſt a copy of it, to make the party more aſcertained of the time of his appearance.

Upon an attachment there are two returns either *Non eſt inventus*, upon which the proclamation iſſues of courſe, or *Cepi Corpus*. Upon *Cepi Corpus* returned, the regular way is to move to *amerce* the Sheriff the ſame term, and to double the *Amerciaments* upon the Sheriff, till he brings in the defendant. Becauſe by the return of *Cepi*, the Sheriff ought to have him in court, and the plaintiff may take an aſſignment of the bail bond, if he likes that better. But if he chuſes to proceed againſt the party, the court hath indulged him to move for a *Habeas Corpus* the ſame term, and after ſeveral amerciaments ſometimes to move for a meſſenger, which is more chargeable

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to the defendant. But they do not allow you to move for a meſſenger, unleſs you have put three or four amerciaments on the Sheriff. And if the body is not brought in the next term, you muſt have a *Habeas Corpus* to bring in the body, and you cannot regularly *amerce* the Sheriff until you have a return of your *Habeas Corpus*. Becauſe tho' the Sheriff took the body and had him ready the former term, yet he might have him in a ſubſequent term ready to be produced in court according to his return. And therefore, according to the ancient practice, the *Habeas Corpus* always iſſued the ſubſequent term; but now for the expedition of juſtice they granted it the ſame term the Sheriff returned the *Cepi*. And upon the ſeveral amerciaments and *Habeas Corpus*, and the body not brought in, you may move for a meſſenger the ſame or the ſubſequent term; becauſe when a *Cepi* is returned, the court may take him out

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of the hands of the Sheriff, and put him into the hands of the meſſenger, who is their own officer.

For the form of an attachment, ſee Harriſon's Practiſer, 255.

But in *London*, *Middleſex*, and *Briſtol*, you may move for a meſſenger immediately; becauſe the amerciaments lodged on the officers of thoſe cities even by the ſuperior courts, are by the charter given to thoſe cities, and ſo the amerciaments would be ineffectual to compel the Sheriffs of thoſe cities to bring in the defendant's body.

Note, that the form of the attachment being, *ad reſpondendum de contemptu per ipſum nobis illa tum et ad faciendum ulterius & recipiendum quod dicta curia conſideraverit*, he muſt anſwer as well as clear his contempts at the ſame time. But the uſual way is not to take the penalty which is no more than for the clearing his contempt, till he hath anſwered. For when the penal ſum is received the defendant

defendant may reaſonably ſay that the fault is purged, and ſo there would be no ſufficient foundation to retain the party or carry on the proceſs, in caſe he will not anſwer; and therefore the uſual way is for the plaintiff to inſiſt that the defendant ſhould anſwer; but the anſwer will not be received without clearing his contempts.

The attachment at common law was two-fold, by the goods or by the body. In all debts the attachment was by the goods, becauſe the debt was only a chattel, and therefore only chattels were liable, and the *Capias* was brought in the action of account by ſtatute [*Marl. cap.* 23.] on a *Nihil* returned on a ſummons.

But the attachment by the body was only for crimes, the leaſt of which was againſt the public peace, or was a contempt of the court, and for theſe a man's perſon was naturally

liable. For tho' a debt at law made only a chattel liable, becauſe the lender truſted to his debtor's chattels only, yet a crime made the ſubjects body liable, becauſe the Prince was thought to have a property in the body of his ſubjects, to ſerve him in his wars, to attend his courts in peace, and to call them to anſwer for offences againſt the laws.

Dalton's Sheriff. 156.

The next proceſs is the proclamation. This is a proceſs iſſuing out of the extraordinary juriſdiction upon a *Non eſt inventus* returned, commanding the party to appear in Chancery ſubpoena *Legianciæ*. Now where a *non eſti nventus* was returned on a *capias* iſſued in criminal matters, they proclaimed the party, and if he did not come in on ſuch proclamation, he was declared an outlaw. So if he contemned the extraordinary juriſdiction, he was proclaimed, and if he was not taken, or did not come in upon ſuch proclamation,

For the form of proclamation and commiſſion of rebellion vide Harriſon's Practiſer, 256, 257. vide Dalton, 379, 380.

clamation, then he was deemed a robber and a rebel, and thereupon a commiſſion of rebellion iſſued.

The next proceſs is a commiſſion of rebellion, and this is a particular commiſſion directed to commiſſioners, *conjunctim* and *diviſim*, commanding that *A. B. ubicunque inventus foret infra regnum Angliæ, tanqam rebellem & legis noſtræ contemptorem attachias ſeu attachiari facias ita*, &c. It hath been doubted whether upon an attachment or proclamation, the Sheriff may break the doors or not. Some have held that the intent of the writ is to go no further then a common *capias*, and that according to the authority of *Semaine's* caſe it would be very inconvenient, that the Sheriffs officers that executed common proceſs, ſhould have by this writ an authority to break into a man's houſe, and that his houſe ſhould not be a protection to him. Others have held that

the writ is *propter contemptum nobis illatum*, and it being in the King's caſe, there is no privilege, or protection againſt the King's proceſs. But the true reaſon of this doubt, both in *Dalton* and *Crompton*, ariſes from the not underſtanding the true nature of proceſs, and the reaſon of *Semain*'s caſe. For doubtleſs upon an attachment or proclamation, the Sheriff cannot break the doors, and the difference as to this matter is, that where there is only authority in a proceſs, to take the perſon or levy the debt, the Sheriff can go no further, becauſe his writ gives him no further authority; but in the King's caſe, or in the caſe of outlawry, there are the words *non omittas propter aliquam libertatem*, and therefore ſuch writ gives authority to break the houſe. Beſides that in the caſe of outlawry no man ſhall receive protection from the law, of which he is declared a violator, and therefore the ſeizing him as an

outlaw,

outlaw, doth imply the liberty of entering and ſeizing him whereſoever he lies hid. But it may be ſaid: why in the common caſe of a contempt, was the proceſs not ſo formed as to give authority to Sheriffs to enter the freehold? The reaſon is,

Firſt, becauſe the very notion of *liberum tenementum* is that the tenant ſhall be freed by the law from all actual violence. For that cannot be ſaid to be held freely, where the Lord that had a right to deſtrain, or the Sheriff that was to ſerve the ordinary proceſs, had a power to enter by force. And if the Lord was not permitted to enter with actual violence, where he had a right to his rent, the Sheriff could not be allowed to enter by force to ſerve the ordinary proceſs.

Secondly, becauſe in the times when the tenures were in their full height, it was thought too ſevere that

that the Lords that had generally demands upon their tenants, ſhould in the firſt inſtance break into their houſes, ſince the violence of ſuch a proceſs in the firſt inſtance might compel them to pay more than was due.

Thirdly, becauſe that the party might be ready and willing to anſwer the demand. Therefore it is ſevere to extort that by violence, when it doth not appear but that the party is ready to pay.

Fourthly, the whole proceſs of a county muſt be ſerved by the Sheriff, but the law muſt in a caſe of this kind, take notice that it could not be ſerved by the Sheriff in his own proper perſon, and it were too much to lodge ſuch a diſcretionary power in the deputy of a miniſter, to violate men's houſes in the execution of a proceſs in the firſt inſtance.

Note,

Note, that the liberty of men's own houſes, ſeems to be a matter very much contended for from the conqueſt till the ſettling of *Magna Charta*. For the Conqueror carried his endeavours to reſtrain men from the freedom they had been uſed to in their own houſes. And therefore in the times of *Henry* the third, under the protection that the law gave to houſes and caſtles, they uſed to ſhelter unlawful diſtreſſes, which were therefore inconveniences provided againſt by the ſtat. of *Marlbridge* and *Weſtminſter*, 1, 2. Selden's Janus, 155, 165.

From this digreſſion, we return now to the commiſſion of rebellion. And there it is plain that the commiſſioners may break open a houſe, becauſe the words of the writ are, that they ſhall attack the party *tanquam rebellem & legis noſtræ contemptorem*. And therefore this is within the reaſon of the proceſs of outlawry. For when you are to take

Dalton 353. Crompton, 33, 47.

take the party as a contemner of the law, the deſign of the writ is, that he ſhould not be any where protected by the law: and therefore it implies an authority to enter into the houſe.

And this is indeed, the reaſon why this proceſs is directed to Commiſſioners under the broad-ſeal, and not to the Sheriff. Becauſe the Sheriff cannot be ſuppoſed to execute all ſuch proceſs in perſon, and it may be inconvenient to truſt ſo great a power with the deputies of the Sheriffs nomination: and therefore this court appoints its own Commiſſioners who are entruſted to do every thing very carefully, and are anſwerable to the court for their miſcarriages.

The next proceſs after a commiſſion of rebellion is a ſerjeant at arms. And that is granted on the return of a *Non eſt inventus*, upon a commiſſion of rebellion, upon motion in court. The reaſon why this proceſs is ob-

ined

tained upon motion, is becauſe there is nothing to iſſue under the broad ſeal, ſo that ſince there is no proceſs under the ſeal to make it a record of the court, there muſt be an act of the court to ſend the ſerjeant.

But here it may be required: why muſt there be a ſerjeant at arms after the return of the commiſſion of rebellion, before a ſequeſtration can iſſue? and the reaſon ſeems to be, becauſe the court will not iſſue a proceſs upon the whole lands, and goods of the defendant, till one of its own officers ſee that the defendants do totally diſappear. And therefore the return of the ſerjeant at arms, is particularly recited in the ſequeſtration. Moreover the ſequeſtration doth not iſſue on the return of the commiſſion of rebellion, becauſe the commiſſioners are of the plaintiff's own nomination.

For the form of this, vide Harriſon's Practiſer 1 vol. 259.

We come now to conſider the laſt proceſs which is the ſequeſtration: and this recites the certificate of the ſerjeant at arms, that the defendant had ſecreted himſelf, and then gives authority and power to the ſequeſtrators to enter the manors, lands and tenements of the defendant, and of taking and poſſeſſing all his real and perſonal eſtate. Great was the ſtruggle between the ordinary and extraordinary juriſdiction before this proceſs came to be ſettled; for in the caſe of *Brograve* and *Watts*, they adjudged ſuch commiſſions to be againſt the rules of the common law; for that the court of Conſcience had only remedy in *perſonam*, and not *in rem*, and that the court might compel the defendant by impriſonment to perform the decree, but could not touch his eſtate. And the Chancellor in the cauſe of *Colſton* and *Gardener*, cites a caſe where they ruled it, that if a man killed a ſequeſtrator

Brograve a Watts Crook El. 651.

Colſton a Gardener 2 C. C. 43.

ſequſtrator in the execution of ſuch proceſs it was no murder. But theſe were ſuch bloody and deſperate reſolutions, and ſo much againſt common juſtice and honeſty, which requires that the decrees of this court which preſerved men from deceit and fraud, ſhould not be rendered illuſory, that they could not long ſtand. And this proceſs got the better of Thoſe reſolutions on this ground.

Firſt, that the extraordinary juriſdiction might puniſh contempts by the loſs of eſtates, as well as impriſonment of the perſon. Becauſe that liberty being a greater benefit than property, if they had power to commit the perſon, they might as well take from him his eſtate, till he had anſwered his contempts.

Secondly, to ſay that a court ſhould have a Power to decree about things, and yet ſhould have no juriſdiction

in rem, is a perfect ſolecism in the conſtitution of the court itſelf.

The ſeveral proceſſes of ſubpoena, attachment, proclamation, and commiſſion, do iſſue without motion. Becauſe the clerks of the office when there is an affidavit made of the ſervice of the ſubpoena, know whether there is an appearance or not, ſuch appearances being formerly entered by the Six Clerks in their own books, and the not appearing upon the return of each proceſs, is the warrant for the making out of the other; but the laſt prerogative proceſſes, that is, the ſerjeant at arms, and the ſequeſtration are only granted upon motion. Becauſe it muſt appear to the court, that the common miniſters of juſtice were not able to take the party before they ſhall recur to the extraordinary method.

But here we muſt note the difference between a *Capias* and an attachment

ment. Upon a *Cepi Corpus* returned upon a *Capias* at law, they amerce the Sheriff if he do not bring in the body upon the ſtatute *W.* 2. *cap.* 39. *Et precepit dominus Rex, quod vicecomes pro hujuſmodi falſis reſponſionibus ſemel et iterum (ſi ſit neceſſe) per juſticiarios Caſtigetur, et ſi tertio deliquirit alius non apponat manus quam Dominus Rex.* And this is upon the words of the *Capias* which are, *ita quod Habeas Corpus ejus coram nobis ad reſpondend:* A. W. *de placito tranſg: ſup: caſum.* So that the command of the writ is not obeyed unleſs he hath the body ready. In an attachment the form of the writ is, *ita quod Habeas Corpus ad reſpondend: nobis tam de quodam contemptu per præfat:* A. B. *nobis illat: ut dicitur quam ſuper hiis quæ illi tunc ibid: objicientur, et ad faciend: atque ad ulterius recipiend: quæcunque dicta Cur: noſtra: in hac parte oconſideraverit & hoc nullatenus omittas, et habeas*

8 Co. 40. Dalton's Sheriff. 174, 178, 179.

habeas ibi hoc breve. By which words it ſhould ſeem they might amerce the Sheriff for not bringing in the body, as they did upon the *Capias* at common law. But becauſe the writ was originally founded upon a contempt, it ſeems that when the Sheriff has taken up the body he has paid obedience to the writ, tho' he does not actually bring him up to the court; becauſe the contempt only induces a commitment, which is ſatisfied by impriſonment in the county goal. And the ſtat. of *Weſtm.* 2. only relates to original and judicial writs, and not to theſe prerogative proceſſes, and therefore they iſſued a *Habeas Corpus*, which is an undoubted writ within the ſtatute, upon which it is proper to ground an amercement.

If the ſubpoena be ſerved and the party appears and afterwards goes away without anſwering, and all the proceſs of the court be ſpent, the bill

ſhall

ſhall be taken *pro confeſſo*. So likewiſe if the party lie in cuſtody and be brought by *Habeas Corpus*, and charged with the bill in court, the bill ſhall be taken *pro confeſſo*. But tho' all the proceſs of the court be ſpent, and he do not appear you cannot have a decree upon the bill. For to have a decree, the party muſt be either perſonally in court, or by his attorney, and therefore ſpending the proceſs will not found a decree, unleſs the party himſelf be before the court, and where the party has once been in court by an attorney; to that attorney the copy of the bill is delivered. And if afterward the whole proceſs of the court be ſpent upon him, and he does not anſwer, the bill is preſumed to be true, becauſe he is fled from that juſtice before which he had appeared, and ſhould have put in his anſwer. So likewiſe when he is in cuſtody and is charged with the bill, the truth of the plaintiff's

tiff's demands is presumed by the obstinate silence of the defendant.

It was long doubted whether a bill may be taken *pro confesso* if the party lay in prison and would not answer. For by the cannon law, if the party would not answer, they did not take the bill *pro confesso*, but proceeded to excommunication for his contumacy. So at the common law, if a man would not plead, you had no judgment on the principal charge, but you had judgment against him for standing mute, for his obstanacy.

These notions did arise from the civil, and cannon law. For in the cannon law, if the defendant did not appear, it was a *delictum* contrary to his canonical obedience, which all Christians they thought were to pay to the *forum ecclesiasticum*, and therefore they proceeded to excommunication. These cond notion was taken from the civil law, which obliged a man to confes

feſs the crime before he was condemned, and they obliged him to ſuch a confeſſion by torture, and therefore with us the pain *fort et dure* was invented to compel him by torture to plead. But it ſeems not neceſſary in courts of Equity to impriſon the party as a pain till he ſubmits to the extraordinary juriſdiction: for in many caſes there would be a failure of juſtice if that were the only remedy; and therefor ethe courſe is more proper that takes the bill *pro confeſſo*, and the rather becauſe now the court doth not go in *perſonam*, but in *rem*, by the proceſs of ſequeſtration.

At the return of the ſubpoena, the defendant muſt appear, and the plaintiff's attorney may give him a rule to anſwer, in eight days, otherwiſe he has a whole term to anſwer. But if that ſubpoena be returnable towards the latter end of term, he muſt anſwer within eight days,

tho' there be not eight days within the term; for the bill is always preſumed to be in the nature of interrogatories filed before the ſubpoena ordered. And now the ſtatute for the amendment of the law, 4. *Ann. cap.* 16. has required, that it ſhould always be ſo, unleſs in caſes of injunction to ſtay waſte, or to ſtay proceedings at law. For it would be prepoſterous that there ſhould be a ſubpoena to anſwer articles objected, without any ſuch articles filed. And before the ſtatute they had relaxed, this rule, allowing until the third day at noon to put in the bill after the ſubpoena was returnable. But the anſwer ſhould be put in that term in which the ſubpoena is returned; becauſe otherwiſe a proper obedience is not paid to the writ, which is to anſwer thoſe things that are objected, and if the party does not anſwer in the term that the writ is returnable, which is one day in law, he does not obey the writ. And tho' the writ

be

be returnable the laſt day of the term, which is likewiſe bringing a man in at the latter end of the day, yet then a man muſt pay obedience to the writ, and put in his anſwer as of that term, that is within eight days after.

If the party appoints a clerk to appear, he may pray a *dedimus* to take the anſwer in the country, which of courſe carries over the anſwer to the next term, as an imparlance does at the common law. But this point muſt be underſtood where the party is ſerved ten miles in the country diſtant from *London*; for if he be ſerved in *London*, though he lives in the country, he muſt anſwer in the ſame term without *dedimus*, unleſs he has leave of the court.

The *dedimus* is a writ that is ſent down together with the articles impowering the commiſſioners to take the anſwer of the defendant, and to

return it in parchment, and refers to the copy of the bill incloſed. For as the crown could examine a ſubject upon articles, ſo could they delegate an authority to others to examine upon ſuch articles, becauſe this was in caſe of the ſubject. Though they have ſince reſolved that the Chancery cannot delegate an authority to judge upon thoſe articles, or erect a new equity juriſdiction; becauſe all equity juriſdictions are in derogation of the common law; therefore this juriſdiction, is immediately confined to the Chancellor, and to the Exchequer, which are equity juriſdictions which have already obtained, and a new juriſdiction in derogation of the common law, cannot be erected without an act of parliament. But now the copy of the bill doth not go with the *dedimus*, the ſame being found uſeleſs, and therefore altered by act of parliament.

If

If the defendant puts in an anſwer which is not ſufficient, either in confeſſing, or avoiding, or traverſing the plaintiff's bill, the plaintiff muſt ſet down his exceptions in writing, article by article, in the ſame term, or within eight days after, and deliver the ſame exceptions to the council whoſe hand is to the bill, or to the defendant's clerk in court. And thoſe exceptions are nothing elſe but a particular pointing out unto the defendant, of thoſe parts of the bill that remain unanſwered. And if ſuch exceptions be taken and allowed, the defendant having not anſwered, the plaintiff ſhall go on with the proceſs where he left off, in order to get a ſufficient anſwer to the articles in the bill. For an inſufficient anſwer is no anſwer at all, and therefore the having not anſwered to theſe things that are objected againſt him according to the original ſubpoena, the contempt is not purged. 4 Ann: c. 16.

And

And it is uſual for the clerk to refuſe to take the coſts of the contempt, till they have got a ſufficient anſwer, leſt thereby it ſhould be underſtood that the contempt was purged, and ſo they ſhould be forced to proceſs *de novo*. But if the defendant puts in four inſufficient anſwers he ſhall have an order to ſtand committed in *vinculis*, becauſe the great vexation that proceeds, from ſuch inſufficient anſwers, and the charge that ariſes from the taking copies of them, ſhew a plain deſign to trifle with the court.

Ordines Curiæ, 124, 145.

If the court more than once gives time to anſwer, they generally oblige the defendant to enter his appearance with the regiſter, which is an appearance upon the record of the court, and is different from an appearance in the office of his clerk. For the appearance by a clerk, and going away without anſwering, is only a foundation to iſſue proceſs, and

and there is no record of ſuch appearance, for the defendant's clerk only gives notice to the plaintiff, which he enters in his book, that the defendant appears. But when he enters his appearance with the regiſter, and does not anſwer, it is a departure in deſpite of the court, upon which the court may order an immediate commitment, ſince this is not merely a contempt of proceſs iſſuing, but of the court itſelf to which he appeared, and hath not anſwered.

Tho' the extent of this juriſdiction is very large, ſince it examines a man upon the articles in the bill, where any equitable circumſtances are ſuggeſted in the petition, that found a demand for anſwers to ſuch interrogations, yet it is not unbounded. But the limits are, the criminal juriſdiction on the one ſide, that is, you interrogate him to any thing that will not criminate himſelf; and the civil on the other, that is to any thing,

thing, that is within the conuſance of the court. And if a defendant be examined to any ſuch articles that are out of the extent of the equity juriſdiction he may demur; a demurrer being as proper in a court of equity as at law, if there be not ſufficient articles to charge the party. And theſe demurrers ariſe upon various heads.

Firſt, if the defendant be examined to any thing that will make him criminal, and draw upon him a penalty; and that is upon the common rule of law, that *nemo tenetur ſe ipſum prodere.*

Secondly, if the party is relievable at law, and there be no circumſtances in equity to deduce an anſwer from the defendant upon articles; becauſe equity is only to aſſiſt the law, and not to ſupplant it. And if there be proper circumſtances to deduce an anſwer in the court of equity, there no demurrer ſhall be

be allowed; as for example, if a man covenant to convey or perform any act, tho' the plaintiff has remedy in a Court of Law, for damage for breach of covenant, yet he cannot have remedy for the performance of the thing, and therefore the Court of Equity will examine why the thing is not performed, and decree the performance of it in ſpecie. And this is aſſiſtant to the common law, becauſe it is a ſupport to mens contracts and bargains, where there could be no judgment at common law, for the actual compleating of them. Thus, if a man exhibits a bill upon a deed, praying relief, and not barely to diſcover it, he muſt make oath that the deed is loſt, becauſe otherwiſe it is does not appear but that the plaintiff is relievable at law, for a man is preſumed to have his own deeds in his cuſtody, and therefore the preſumption is againſt the allegations of the bill, unleſs it be attended

Chancery caſes, folio 11.

tended by an oath. And antiently it was very common to make perſons ſwear to the allegations of the bill, before they would grant the proceſs of the ſubpoena, leſt the ſubject ſhould be put to an unjuſt vexation; which is likewiſe agreeable to the proceedings in the eccleſiaſtical court.

Clerk's Praxis, fol. 37.

Thirdly, if a man does not ſuggeſt a proper Equity in his bill, it is a cauſe of demurrer. For if his bill was proved he could have no decree, and that is a good reaſon why the defendant ſhould not be called to anſwer.

Fourthly, want of proper parties is a good cauſe of demurrer, and this is for the ſame reaſon. Becauſe, if the plaintiff does not intitle himſelf to relief, and to have a decree from the court, which he cannot have, unleſs all the parties concerned in intereſt be brought before the court,

court, then it is improper to draw the defendant to anſwer to articles charged againſt him.

As demurrers are where there is no ſufficient matter contained in the bill to bring the defendant to anſwer the interrogateries exhibited in the bill, ſo pleas are the ſhewing ſome matter to the court, whereby it appears, that the plaintiff ought not to be anſwered. And theſe are threefold; either to the juriſdiction of the court, or in diſability of the perſon, or to the matters in the bill charged.

Firſt to the Juriſdiction of the court. General matters about the juriſdiction of the court, are determined by demurrers; but there is one plea to the juriſdiction of the court, and that is upon priority of ſuit in the court of *Exchequer*, or other courts of Equity. And this is not like other pleas and demur-

rers ſet down with the regiſter, becauſe it is moſt certainly a good plea, if true; and therefore, if the plaintiff be not ſatisfied of the truth of it, he may pray a reference thereof to the maſter, and if the maſter certify it to be true, the plaintiff ſhall pay five pounds coſt to the defendant for his double vexation; and if ſuch reference be procured by the plaintiff, and he does not procure a report within one month after fyling the ſaid plea, the bill is to ſtand diſmiſſed with the coſt of ſeven nobles. For the examination of facts, touching proceedings then part of the buſineſs of the court, is properly within the care of the maſters.

But if a ſuit be commenced at common law, or in any other inferior courts of law, and afterwards a bill is exhibited in Chancery, formerly 'twas a good plea to plead the dependency of ſuch ſuit. But now this manner

ner of proceeding is alter'd, becauſe poſſibly ſuch bill may be meerly for diſcovery, in order to give the defendant's anſwer in evidence: therefore after anſwer the court will put the plaintiff to make his election, either at law or in this court. And hear again, if the ſuit at common law be not for the ſame thing as in Equity, that may appear upon a reference to one of the maſters of the court.

Secondly, the ſecond plea is in diſability of the perſon; and ſuch are the pleas of outlawry or excommunication. Theſe, as they diſabled the perſons from ſuing at law, ſo they alſo diſable them from bringing a bill in the court of Equity. But if outlawry be pleaded, the record of outlawry *Sub pede Sigilli* muſt be pleaded; for being to the diſability of the perſon, ſuch diſability muſt be ſhewn to the court upon

upon record, as is done at common law.

If the outlawry be for the ſame thing for which the plaintiff ſeeks relief, ſuch plea ſhall be diſallowed, becauſe it is *exceptio ejuſdem rei cujus petitur diſſolutio.*

If the plaintiff conceive that ſuch plea is inſufficient, thro' miſpleading, he may give notice to the clerk on the other ſide, and ſet it down with the regiſter. But if it is not enter'd within eight days after filing, the defendant may take out a ſubpoena for coſts, as if the plea had been allowed, becauſe ſuch outlawry is a bar to the plaintiff againſt his examining the defendant to any articles upon his bill.

And therefore a ſubpoena will lie for the coſts for the unjuſt vexation of the defendant, as well as if there had been no bill put in at all.

And

and as a ſubpoena was formed to bring the party to appear, ſo a ſubpoena was likewiſe formed for any unjuſt coſt ſuſtained by the appearance of the defendant, where no interrogateries were or could be exhibited againſt him.

But if the outlawry be reverſed, the plaintiff may take out a new ſubpoena, becauſe he then ſtands *rectus in Curia* to have his bill anſwered.

Thirdly, the plea may be to the matter of the bill, by ſhewing ſome cauſe why the defendant ſhould not anſwer the plaintiff. And this muſt be ſuch a cauſe that ſhews the plaintiff is not entitled to the enquiry he deſires. As if it be an enquiry after his title to land, the defendant may ſhew he is purchaſer for a valuable conſideration, without any notice of the plaintiff's title at the time of ſuch deeds of purchaſe. For when the

the defendant comes in with a good conſcience into the eſtate, he is not obliged to diſcover any ſecrets of his title which afterwards came to his knowledge; for it would be intolerable to the people if ſuch an enquiry ſhould be carried farther than into an inſpection of the title, at the time of the purchaſe.

Another plea to the matter of the bill, is a releaſe or diſcharge of the matter in demand, unleſs ſuch releaſe was obtained by fraud, and then the party muſt anſwer to the circumſtances of fraud alledged againſt the releaſe.

Thirdly, a ſtated account may alſo be pleaded againſt any bill that is alledged to bring a man to account. And the plaintiff muſt, in ſuch a caſe, aſſign errors in ſuch account, but cannot unravel the whole account, when once it is made up and balanced; becauſe, if theſe things

things were allowed to be broke through, people could come to no ſettlement or end in tranſacting of buſineſs; therefore this is allowed as a plea in relation to the articles in the account contained.

First Chancery caſes, 20, 26.

Fourthly, the Statute of limitations is a plea in relation either to lands or tenements, where the plaintiff would change the poſſeſſion by a decree after the time of limitation is paſt, and likewiſe againſt payment of a debt where the time of limitation is incurred by the ſtatute. But a truſt is not within the ſtatute, ſince the ſtatute is made upon preſumption, that after length of time the debt is paid, and therefore, if the defendant cannot ſwear that the debt is paid, a truſt will ariſe to the plaintiff which is out of the ſtatute.

But here it may be very properly enquired, why a plea or demurrer

over-ruled in equity only induces a *Reſpondeas ouſter*, whereas a demurer at law, or plea to the action is final.

As to a plea or demurer in equity, there may this reaſon be given: that by proteſtation the defendant ſaves himſelf from being concluded by the bill, or that he takes it *pro confeſſo*, which is indeed the meaning of the proteſtation in the beginning of every plea and demurrer. But tho' this form is calculated to prevent a concluſion to the defendant, and was no doubt at firſt inſtituted for that purpoſe, Yet is not this a ſufficient anſwer to this enquiry; for if a man ſhould demur or plead at law, and yet ſave to himſelf by proteſtation, that he did not confeſs or acknowledge the truth of the complainants declaration, this would be ſo far from a good demurrer or plea at law, that it would be a good reaſon to over-rule it as a contradiction and repugnant, becauſe a plea

a plea to the action or demurrer at law, doth naturally confeſs the truth of the plaintiff's charge; ſo that the true reaſon of this difference muſt be drawn from the different nature and genius of the two courts. For the actions at law are ſo calculated as to contain one cauſe of complaint; if in ſome caſes they contain more than one, as in actions of treſpaſs where damages were given for diſſeiſins that were attended with ravage and deſtruction in houſes, lands, or trees, yet they are ſo far one, that they are all the ſame outrage exerciſed in different manners and have the ſame plea, and are determined by the ſame verdict and judgment. But the fact complained of is conſidered as one, and therefore the court allowed but one defence to the action, that is, either to demur to the legality and ſufficiency of the declaration, or to deny it. In either of theſe caſes each defence was final; for otherwiſe there would be two different ſorts of de-

fence allowed to the ſame thing, which is contrary to the unity they preſerved in all their pleadings at common law. But the chancery interrogatories relating to many facts, and each being put together in the ſame petition or bill, upon which the equity of the whole cauſe was to turn, they therefore did not preſerve that unity in the charge, and therefore allowed them different defences, *viz.* to demur and and ſhew a cauſe why they ſhould not anſwer, and afterwards to anſwer and deny the fact. Beſides that where articles are exhibited, it is in order that the party ſhould anſwer, which is the *giſt* of the parties petition, and the inlet of the ſubpoena; but the *giſt* of the action at law is a reſtitution; ſo that if the party only inſiſt on the illegality of the charge, it is to be ſuppoſed that that defence is the only bar he hath to the reſtitution.

The

The anſwer begins in the form of the civil law, *viz. Sub proteſtatione de nimia generalitate, ineptitudine obſcuritate, nullitate, et indebita ſpecificatione dicti libelli*; and the oath is in the ſame manner, *de ſcientia in his quæ proprium tuum factum decerinunt, et de credibilitate in facto alieno.*

Having thus conſidered the bill and anſwer, demurrer, and plea in general, we ſhall finally conſider the nature of a bill.

The bill anſwers to the libel in the cannon law, as the ſubpoena does to the citation; and as the citation in the cannon law, does not ſpecify the particular and diſtinct cauſe of action, ſo neither does the ſubpoena in equity; and therefore any equitable bill may be founded on the ſubpoena, as any libel might on the citation; or, (which is much ſtronger) Clark's Praxis 35.

two

two diſtinct bills might be grounded on the ſame ſubpoena, between the ſame parties, for different cauſes.

In the bill, the fact muſt be ſet out as it is, with all equitable circumſtances, and proper interrogatories formed and put to the conſcience of the defendant upon the fact and circumſtances. But no interrogatories can be put that do not ariſe from ſome fact charged in the body of the bill, or, if ſuch interrogatories be put, the defendant may either demur to ſuch interrogatories as having no foundation in the bill, or may omit to anſwer them; and if there be exceptions for want of an anſwer to ſuch interrogatories, the exceptions on a reference will be over-ruled with coſts.

Care muſt be taken in the bill, that the plaintiff of his own ſhewing, hath not a remedy at law, for that will be good cauſe of demurrer. And for

for this reaſon, as it is ſaid there muſt be an affidavit to the bill, where relief is demanded. But fraud is properly conuſable in a court of equity, becauſe it lies in the dark, and is diſcoverable principally from the oath of the defendant himſelf, and therefore, tho' an action on the caſe lay upon the fraud, yet it is proper for a bill in equity.

And it is a general rule, that whereever the matter of a bill is merely in damages, there the remedy is at law, becauſe the damage cannot be aſcertained by the conſcience of the Chancellor, and therefore muſt be ſettled by a jury at law; and therefore the Chancery never tries the *quantum* of the damages in a *quantum damnificatus*, where you demur to the bill, unleſs there be matter of fraud mixed with the damages.—As if *A.* brings an action of covenant at law for damages, and *B.* fyles a bill for an injunction, upon this equitable ſuggeſtion,

tion, that the covenant was obtained by fraud: if *A.* fyles his croſs bill for relief upon that covenant, the court will let him obtain it, becauſe the validity of the deed is brought in queſtion in that court, on a head properly conuſable there; and therefore if the validity of the deed be eſtabliſhed, the court will direct an iſſue for the *quantum* of the damages.

But a man comes properly into a court of equity, for the ſpecific performance of a covenant, becauſe a man is in conſcience obliged to perform his own cotnract in ſpecie and therefore the relief at law which gives only damages for the breach or non-performance, is inadequate, and conſequently the plaintiff is proper in equity, for that ſpecific performance which he cannot obtain at law, and therefore the court retains ſuch bills.

But

But here a diſtinction is to be obſerved, that where the common law would give the ſame relief as a court of equity, there, if the defendant would deny the deed, and demur to the relief, the demurrer will be allowed. If the covenant were to pay a certain ſum, and the deed be denied, the defendant hath a right to try it by a jury, and there being the ſame relief at law in this caſe as in equity, to avoid circuity the cauſe ought to be diſmiſſed and left at law, and the rather, becauſe equity doth not relieve where the plaintiff hath the ſame relief at law.

But if the defendant doth not demur to the relief, but anſwer, and the deed denied by the anſwer, is proved in the cauſe by two witneſſes, the court will decree for the plaintiff on the hearing; but if it be proved only by one witneſs, there the court grants a leading order to try it at

law, and then the parties come back upon the equity reſerved, becauſe the defendant admitted the juriſdiction, by anſwering and putting it in iſſue, and not demurring thereunto.

But where the covenant is not for the payment of money, but for the doing a thing in ſpecie, as conveying lands or executing deeds, there tho' the defendant denies the deed, yet he cannot demur to the relief, becauſe the plaintiff ſeeks a different relief, and is intitled to other relief if the deed be good, than what the law can give him; and therefore, the defendant's ſuit is well inſtituted in the court of Equity, ſince he muſt come back for that relief to equity after the deed is eſtabliſhed by law.

Secondly, where conveyances are defective, if they be upon valuable conſideration, a court of Equity will oblige the vender or mortgager to make

make good the defect, becauſe it is according to conſcience, that he ſhould make good his agreement or contract, and this as well where there are covenants for further aſſurance, as where there are not. But where there is a defective conveyance without an equitable conſideration, a court of Equity will not oblige him to make it good, tho' there be a covenant for further aſſurance; as if a man makes a voluntary feoffment to a ſtranger without livery, the feoffer or his heir ſhall not be obliged to make good that defect, but it ſhall be conſtrued in equity to be an eſtate at will, as it is in law.

But if a man conveys to a younger ſon by a defective conveyance, a court of equity will oblige the father and the heir to make it good. The father ſhall make it good whether there be a covenant for further aſſurance or not, becauſe the convey-

ance ſhall be intended a proviſion for the ſon, which is a good conſideration, the father being obliged to provide for him by the law of nature.

The heir ſhall likewiſe make it good in theſe two caſes.

Firſt, where there is a covenant for further aſſurance binding the heir, becauſe the heir is bound by the covenant.

Secondly, where there is a proviſion made by the father in his life time for the heir, or where he hath ſuch a proviſion by deſcent from the father, there the heir ſhall make it good without a covenant for further aſſurance; becauſe the intention of the father to provide for his younger ſon, is juſt and equitable, and therefore the heir ſhall fulfil it.

But where the father conveys to the ſon by a legal conveyance, and afterwards ſells to a ſtranger for valuable

luable conſideration, but by a defective conveyance or by articles agreeing to ſell, the ſon ſhall be obliged to ſupply the defect in the ſecond conveyance, or to execute a deed purſuant to the articles, becauſe the purchaſer for valuable conſideration is to be preferred in equity, before the proviſion for the ſon; and the proviſion for the ſon is eſteemed fraudulent in Equity, where the father afterwards conveys for valuable conſideration.

But if a man makes a conveyance to a ſon, and the ſon ſells for valuable conſideration, and after the father ſells for valuable conſideration, the purchaſer from the ſon ſhall prevail, becauſe he had purchaſed for conſideration, without notice of the father's intention to ſell afterwards for value; and therefore as he comes in with a good conſcience, and for value, he ſhall hold againſt the purchaſer of the father.

But

But if the purchaſer from the ſon comes in by a defective conveyance, and the purchaſer from the father comes in by ſufficient conveyance without notice of the ſale by the ſon, he ſhall hold it againſt the vendee of the ſon, becauſe both are equal in equity, and then he who has the legal eſtate of courſe prevails.

1 C. Caſes 172. 2 Vent. 350. 1 Lev. 238.—9.

If a tenant in tail, makes a conveyance for valuable conſideration, without fine or recovery, and dies before the fine or recovery is levied or ſuffered, a court of Equity will not oblige the iſſue in tail to make good that conveyance by docking the intail, becauſe the court of Equity cannot ſet aſide the ſtatute *de donis*, which ſays that, *voluntas donatoris obſervetur*; nor would the court ſet up a new manner of conveyances for docking an intail, other than by fine and recovery. But if the iſſue in tail receives part of the purchaſe money

money in his father's life time, or after his death, or if he had joined in the deed with his father, or covenanted for further aſſurance, a court of equity would oblige him to make it effectual by fine and recovery.

But if a tenant in tail covenants for valuable conſiderations, to levy a fine, and is decreed to do ſo by a court of equity, but dies before the fine is levied, his heir is bound by the decree and ſhall be compelled to levy the fine. And the reaſon is, becauſe the court of Equity would have decreed, that whenever the maſter of the eſtate receives money, his heirs ſhould have conveyed, if that would not have introduced a new manner of conveying of eſtates tail. For a court of equity would not have it diſtinguiſhed whether the conveyance was by fine or recovery, when price was paid, or by deed under hand and ſeal only. [For livery was as eſſential to paſs

paſs a fee at common law, as the recovery was to paſs the tail, and yet the court of equity diſpenſed with the ceremony of livery where price was paid for the intail.] If it had not been for this inconvenience, that it would have introduced a new manner of conveyancing of intails. And as copy-holds were conveyed by ſurrender, ſo intails were conveyed, by fine and recovery, and they have never changed the methods or inſtruments of conveying of theſe eſtates. And it would have altered the very method of conveying the intail, if the heir ſhould be bound ſpecifically to perform the covenant: becauſe no purchaſer would have troubled himſelf with a fine or recovery, if when the iſſue in tail had moleſted him, he might have reſorted to equity, and had an injunction or other relief there; and the King would have loſt a great perquiſite by the fines on the writs of entry, and in fines for alienation, if any other

other method of conveying eſtates tail had been eſtabliſhed. But none of theſe inconveniences will enſue, where they inſtitute a ſuit in the life of tenant in tail, and obtain a decree againſt him to levy a fine and ſuffer a recovery. For there it appears that the purchaſer doth not truſt to any other conveyance than a fine or recovery from tenant in tail, when he comes in his life time to oblige him to execute them. And the original equity of the purchaſer is not altered by the accident of the death of tenant in tail, but the iſſue ſhall be bound to make it good according to the maxim, *qui decretum habet ad rem recuperandum, ipſam rem videtur habere.*

And it ſeems that if the heir in tail, tho' not heir to the covenant, and the remainder man alſo will be bound by the decree againſt the then tenant in tail, becauſe it is a decree in *rem*, and not merely in *perſonam:*

that then whoever comes in after the perſon who ſold, and who at the time of the ſale had the entire dominion over the land, ſhall be bound by the decree that affects the land itſelf. *Sed quere.*

But there is no doubt that if a tenant in tail of a copy-hold ſhould ſell his copy-hold for money, and die before the ſurrender, a court of Equity will decree the heir in tail ſhould convey, becauſe the Intail of a copy-hold is at common law, and not within the ſtatute *de donis*, and therefore the want of a ſurrender will here be ſupplied as well as livery.

1 ch. C. 234. 2 ch. C. 64. 2 Vent. 350.

But if tenant in tail of a truſt in Equity comes to the court for a ſpecific execution of the truſt, and deſires that it may be executed to him in fee: though he be maſter of the eſtate, yet the court will not decree it to him in fee, becauſe that would be an injury to the remainder man,

man, inaſmuch as there is a hazard that the tenant in tail may die before the intail be docked by the recovery. And ſo it is if money be deviſed to be laid out in land, to be ſettled in tail with a remainder over, if the tenant in tail applies to equity for the money, he cannot have it without the conſent of the remainder man, becauſe the money is conſidered in equity as land, and as equity cannot bar the remainder, upon an entail of lands without a recovery, ſo neither can they decree the abſolute property of money, without the remainder man's conſent: and if he doth not conſent, you take away the hazard he has of obtaining the money in caſe the tenant in tail ſhould die before the purchaſe made, or after the purchaſe made, and before the recovery ſuffered.

And here by the way we may take take notice that it hath been the opinion of equity men, that if tenant in

tail of a truſt contract debts that will effect lands, as if he mortgages the eſtate, or confeſſes judgment and dies, *poſt prolem excitatam*: that the court will decree ſuch debts to be paid out of the truſt eſtate in favour of creditors, againſt the iſſue in tail, or the remainder man; becauſe they conſtrue their own creature as a fee ſimple conditional before the ſtatute *de donis*, which became abſolute by the having iſſue and the *donee* thereby had the power of alienation over it.

Having thus ſaid how far the tenant and heir in tail ſhall make good a defective conveyance, the next thing to be conſidered is how far the aſſignee of the perſon making ſuch defective conveyances, ſhould be obliged to make them good.

And here in the firſt place, if a man makes a defective conveyance as a mortgage by feoffment without livery,

livery, and after ſhould convey to a purchaſer for a valuable conſideration by an effectual conveyance without notice, the ſecond ſhall undoubtedly prevail: becauſe he hath both law and equity, and there the title at law muſt prevail, there being no equity to ſet it aſide.

But where *A.* takes a mortgage by a defective conveyance, as by a feoffment without livery, and the mortgager borrows money of *B.* upon bond only, and he afterwards obtains judgment againſt his heir, and extends the mortgaged lands, a court of equity will relieve *A.* and oblige *B.* to ſupply the defect of livery in the mortgage. For in this caſe *B.* was only a bond creditor, and his original ſecurity and relief, was only in *perſonam*, and therefore when he betters his ſecurity by a judgment in *rem*, yet this ſhall be only a *lien* on the land, as it was in poſſeſſion of the mortgagor or his heir;

heir; and that is ſubſequent to a mortgage defective at law, but which was good in equity. And they keep them bound in a court of Equity to make good the defective conveyance. And there is a manifeſt difference between this and the common caſe where a man mortgages land to *A.* and afterwards to *B.* and afterwards to *C.* without notice; there *C.* having honeſtly taken the land as his pledge, has a title to the land itſelf, and therefore he might take in the title of *A.* to ſtrengthen and corroborate his own; tho' by that means he crouds out *B.* for he that hath an honeſt title to the land, may take in a precedent title to ſecure his own, but he that has no title to lands, as the bond creditor had not, cannot ſubſequently ſecure that money by judgment, ſo as to croud out a perſon that had a title to the land itſelf. For the forming a legal title to the land by the judgment on the bond, which was originally a perſonal ſecurity,

curity, is graſping at land, which then in a court of Equity belonged to another. For the courts of Equity will not ſuffer the perſon that originally lent upon the ſecurity of land, to have that ſecurity deſtroyed by one that did not lend upon that ſecurity, ſince a court of Equity would not let a ſubſequent lender on the land, with notice, deſtroy or take place of ſuch defective conveyance; and if ſuch defective mortgagee had the deeds, the ſecond lender muſt neceſſarily have notice, ſince without the deeds, a title could not be made out to the ſecond lender. And the bond creditor coming in on the perſonal ſecurity, to whom no notice could be given, and whoſe perſonal ſecurity, did not, in its own nature, require a ſight of the deeds, ought not, therefore to be in a better condition than a ſecond mortgagee, coming in with notice. And if this ſhould not be allowed in a court of Equity, if there were a de-

a defective mortgagee, or purchaſer tho' always in poſſeſſion of the lands, yet if the vendor had any debts, by bond, or ſimple contract, prior in time to ſuch purchaſe or mortgage, he might by confeſſing judgment to ſuch creditor, ſubſequent to ſuch purchaſe or mortgage, avoid or poſtpone his own mortgage or ſale. For theſe reaſons equity had obliged the bond creditor who obtained judgment and extended the mortgaged land to ſupply the defect in the mortgage or purchaſe, and gives injunctions to put the mortgagee or purchaſer into the poſſeſſion of the land.

But if *A* makes a defective mortgage to *B*. and *A* continues in poſſeſſion, and afterwards gives a bond to *C* with warrant of attorney, to confeſs judgment, and *C*. enters judgment immediately; there it ſhould ſeem that the bond, warrant, and judgment, are to be looked upon

upon as one act, and that *C.* had the land originally in view for his ſecurity; and there *B.* cannot have relief againſt *C.* upon the defective conveyance, in a court of Equity.

Where an agreement relating to lands, is not reduced into writing, according to the ſtatute of frauds and perjuries, the court of Equity cannot relieve or compel the performance of that agreement, becauſe the ſtatute was made on purpoſe to prevent thoſe agreements form being carried into execution, where there was no writing. Yet if an agreement be made, tho' not in writing, and the party by whom it was made, receives all, or part of the money, Equity will compel a ſpecifick performance of the whole agreement; becauſe this is out of the ſtatute, which deſigned to defeat ſuch agreement, only where no part thereof was carried into execution, and where the whole was ſet

up merely by parol. For the occaſion of fraud and perjury, was that perſons uſed to ſwear verbal agreements upon others, and by ſuch falſe oaths, charge the parties in Equity, to perform agreements which perhaps had never been made; and therefore the mere parol proof of ſuch agreement, concerning lands, cannot be admitted in a court of Equity. But where the price is paid, there it doth not ſtand upon the parol proof of the agreement only; but upon the execution of the agreement, which is the evidence that the agreement was really made; therefore there is the ſame reaſon that the plaintiff in equity, ſhould have the land for his money, as there is, that every perſon ſhould deliver the goods where he hath received the money for them.

2 Ch. C. 136. But here it may be doubtful in ſome caſes, what ſhall be a proof of

of the receipt of the money by the defendant. Thus far ſeems certain, that if the defendant in his anſwer, confeſſes the receipt of the money for the purpoſe in the bill, or if he denies the money, and it be proved upon him, by writing, as by letter under his hand, or other written evidence, he ſhall be obliged ſpecifically to perform the whole agreement, becauſe he hath carried part into execution.

But if the defendant confeſſes the receipt of the money, but ſays that he borrowed it from the plaintiff, and that he did not receive it in execution of that agreement, there he turns the proof of the agreement upon the plaintiff, and then it ſhould ſeem that the plaintiff ſhould prove by ſome written evidence the receipt of the money by the defendant for the purpoſe of bill, or prove the agreement itſelf by ſome writing.

But if the plaintiff can only prove the agreement for the ſale, or the receipt of the money in execution of the agreement, merely by parol evidence, this will not be ſufficient to ſet up ſuch agreement againſt the ſtatute, becauſe ſuch parol evidence is excluded by the ſtatute.

Again, becauſe the parol is not applied to the bargain, but to the act of receiving the money, which if proved to be received is purſuant to the bargain: then the act of receiving is a further evidence of the bargain than the parol of ſuch bar gain only, and the proof of the agreement ſtands upon the act of receving.

2 Vent 361.

But if *A.* buys lands with the money of *B.* there is a reſulting truſt to *B.* ariſing by operation of law, which the ſtatute doth not extend to, and if the defendant confeſſes the receipt of the money for that purpoſe,

purpoſe, or if the plaintiff can prove it by parol evidence it is ſufficient; for the application of money under a truſt makes the lands purchaſed by the money ſubject to the truſt, and ſo excepted by the ſtatute.

THE END.

THE EARL of *OXFORD*'s CASE IN CHANCERY.

Magdalen College, 19 *Hen.* 8. being ſeized in fee of the Rectory of *Chriſt-church*, and the Convent-garden, without *Aldgate*, *London*, containing —— Acres, demiſed it for ſeventy-two years, rendering 12 *l. per annum* for the Rectory, and 9 *l.* for the Garden.

Anno 17 *Eliz.* twenty-five years being unexpired, the Queen, at the ſuit of the college, licenſed them to alien, which they did, and then reſerved for

for the Rectory 25 *l.* and for the Garden 15 *l. per annum.* It being the intent of her Majeſty thereby, that the college ſhould be advanced greatly in profit by having the Rectory to them, and their ſucceſſors, diſcharged of the leaſe for years, which in preſent, was worth to them 40*l. per annum*; and that one *Spinala*, and his heirs, ſhou'd have only the Garden, paying 15 *l. per annum*, being the uttermoſt rent. Which accordingly was performed by a conveyance to her Majeſty, of the whole, and from her Majeſty to *Spinala* of the Garden, and of the Rectory from *Spinala* to the college.

After which, upon the garden, *Spinala*, and the Earl of *Oxford* his aſſignee, and his under-tenants, have built one hundred and thirty houſes, and therein beſtowed 10,000*l.* which aſſignee, and his under-tenants,

tenants, have bonds and ſecurity given to them for the enjoying thereof, to 20,000 *l.*

The college is advanced 7 00 *l.* more than they would have been, if the old leaſe had been continued, which is not yet expired. And this conveyance has been in peace for forty years, and much improved by the purchaſers from a thing of no value, and it is a general caſe, wherein all perſons, of all degrees and callings, who have made purchaſes, are intereſted, as reſting ſecure, in paſſing thro' the crown, the greateſt protection.

The preſent maſter of the college, having, by undue means, obtained the poſſeſſion of one of the hundred and thirty houſes, whereof one *Caſtalion* was leſſee, and thinking himſelf ſecure of his title in Law and Equity, ſeals a leaſe thereof for three years to one *Warren*, who thereupon brought an

Ejectione Firmæ againſt one *John Smith*, for the trial of the title thereof, in the *King's-bench*, wherein a ſpecial verdict was had, and pending the ſpecial verdict in argument, the leaſe ended: and ſo no poſſeſſion could be awarded for the plaintiff, nor fruit of his ſuit; yet he proceeds to have the opinion of the Judges, to know the law, which was a voluntary act of his, to the intent, if the law were with him, he might begin a new ſuit at law for the poſſeſſion, and ſpare to proceed in Equity; and if the law were againſt him, then he might proceed in Chancery; and the Judges of the court, having deliver'd their opinion againſt his title, before any judgment entered upon the roll the Earl, and Mr. *Wood*, for themſelves and the leſſees, preferred their bill in * Chancery,

* At this period the Judges refuſed to let any ſuitors proceed in Equity after a judgment at law. See the caſe of *Courtney* and *Glanvil* determined in the 12 *Jac. Cr. Jac.* 343.

and

and then a judgment was entered *quod nihil capiat per Billam.*

To] which Bill the defendants in Equity made a demurrer and plea, alledging the conveyance to be void by the ſtatute of *Eliz.* and that they evicted one houſe, parcel of the premiſſes, by judgment at law, which demurrer and plea, was, by order, referred to Sir *John Tindall*, and Mr. *Woolbridge*, who have reported, that they thought it meet, the cauſe ſhould be proceeded upon unto hearing, notwithſtanding the demurrer and plea. After a default of an anſwer, an attachment was awarded againſt the defendants, whereupon the defendants were attached, and the *Cepi Corpus* returned, and by order of the twelfth of *October*, 13th *Jac.* the defendants were committed to the *Fleet*, for their contempts in refuſing to anſwer; and now ſtand bound over to anſwer their contempts, ſtill refuſing to anſwer.

The court of Chancery decreed that this whole proceeding was properly examinable in Equity, and that the defendants thus ſtanding in contempt, the plaintiff may be admitted to proceed to his proofs without anſwer; (as it was in *Tennings*, a *Taylor*'s caſe, in 38 & 39 *Eliz.* ſo, if they anſwer not by a Day, the bill may be taken *pro confeſſo.*) and that the houſe whereof the poſſeſſion was unduely gotten by the defendants may among the reſt be ſequeſtred till the Bill is anſwered.

Argument for the Plaintiff in Chancery.

The law of God ſpeaks for the plaintiff in Equity; Equity and good conſcience ſpeak for him; the law of the land ſpeaks not againſt him, but ought to join hand in hand to moderate ſuch extremities. By the law of God, he that builds a houſe, ought to dwell in it; and he that plants a vineyard, ought to gather

Deut. cap. xxviii. ver. 30.

gather the grapes thereof: and yet here is the conſcience of the Doctor, that he would have the houſes, gardens and orchards, that he never built or planted.

But the Chancellors have always corrected ſuch corrupt conſciences, and cauſed them to render *quid pro quo*: for the common law will admit no contract to be good without conſideration, and no land to paſs without a valuable conſideration; and therefore Equity muſt ſee that a proportionable ſatisfaction be rendered. As *Trin.* 39 *Eliz. Peterſon, contra Hickman*, the husband made a leaſe of the wife's land, the leſſee being ignorant of the defeaſible title, built upon the land, and was at great charge. The husband died, and the Wife avoided the leſſee, but was compelled to give recompence for the building and bettering the lands, for it was ſo much the more worth unto her.

And

And whereſoever one hath benefit the Chancery will compel him to give recompence, as if the feoffee to an uſe ſells the land, to one that hath no notice, and dies; by reaſon that he hath had the benefit of the ſale, his executors out of his eſtate were ordered to anſwer the value of the lands to the *Ceſtuy que uſe*, as appears by a judgment, Roll 34, fol. 8.

And his Lordſhip deſires but to be ſatisfied for the true value of the new buildings, and planting ſince the conveyance, and convenient allowance for the purchaſer, and Equity ſpeaks as the law of God ſpeaks; but you would ſilence Equity.

Firſt, becauſe you have a judgment at law.

Secondly, becauſe you have a judgment upon a ſtatute law.

As a right in law cannot die, no more

more can equity in Chancery die, *nullus recedat Cancellariâ ſine re medio.* And therefore 4 *H.* 4. 11. the Chancery is always open, and tho' the term be adjourned, yet the Chancery is for conſcience always ready to render every one his own due; and 9 *E.* 4. 11. the Chancery is only removable at the will of the King and Chancellor, and by 37 *E.* 6. 15. the Chancellor muſt give account to none but the King and the parliament. The cauſe is, that for as much as new actions are ſo diverſe and infinite, that it is impoſſible to make any general law, which may aptly meet with every particular act and not fail in ſome circumſtances, the office of the Chancellor is to correct men's conſciences from frauds, breaches of truſt, wrongs and oppreſſions, of what nature ſoever, and to reſtrain the extremity of the law, which is called *ſummum Juris.*

Law

FIRST TO CONSIDER THIS AS A JUDGMENT AT LAW.

Law and equity are diſtinct in their court, judges and rules of juſtice, and yet they both aim at one end, which is to do right: as juſtice and mercy are diſtinguiſhed in their effects and operations, yet both join in the manifeſtation of God's glory. But it is no judgment upon the matter, but a diſcontinuance of the ſuit, which gives no poſſeſſion, and tho' to proſecute at law and in Equity together be vexatious, yet voluntarily to attempt law in a doubtful caſe, and alſo to reſort to equity is neither ſtrange nor unreaſonable.

But take this as a judgment to all intents.

There is no oppoſition to the judgment, neither will the truth, or juſtice of the judgment, be examined in this court, nor any of the circumſtances depending thereupon, but the

the ſame is juſtified, and approved, and therefore a judgment may be examined in equity, ſo as the truth of the judgment be not examined.

No poſſeſſion, eſtabliſhed by the King's writ, after a judgment, is ſought to be impeached, for the plaintiff by his leſſee ſeeking to be relieved at the common law is barred, and now is his time to ſeek relief in the Chancery when the common law is againſt him.

Doctor and *Student*, fol. 10. A ſtudent is ſworn to give council according to the law, that is, according to the law of God, and upon both the laws of God and reaſon is grounded that rule to do as one would be done unto.

One bound in an obligation to pay the money, and taketh no acquittance, by the common law he ſhall be compelled to pay the money again;

but when it appeareth that the plaintiff ſhall recover by law, the court may adviſe him to take a ſubpoena in Chancery, ſo 1 *H.* 7. 14. if he deliver acquittance without ſale; or the money paid after the day, or loſe the acquittance. If the judgment be had in any of theſe caſes, the party may reſort to equity, 22 *Ed.* 4. 7 *H.* 7. 11.

After a judgment, if the party have a releaſe, he may have an *audita querela*, which is a *Latin* bill in equity, if his conſcience be ſo large as to wiſh to be doubly ſatisfied, ſo if a ſtatute be entered into by dureſs and menaces and the party be in execution, yet he may avoid it by dureſs of impriſonment, 15 *E.* 4 *Fitz. Nat. Brev.* 104. *L.* 20. *E.* 3. and *Querela* 27. and yet it is a judgment upon record; ſo of a judgment by confeſſion of a letter of attorney, which cannot be denied.

Mich.

Mich. 30 *Jac.* B.R. in *audita querela.* By the court, if a judgment be given upon an uſurious contract, and it is part of his agreement to have the judgment, the defendant may avoid that by *audita querela* or *ſcire facias* upon the judgment; whereby it appeareth that if judgments be obtained by oppreſſion, and a hard conſcience, the common law will fruſtrate them, not for any error or defect in the judgments, but for the hard conſcience in the party, and therein the judges play the Chancellor's part, and yet theſe are not within the ſtat. of 4 *H.* 4. *cap.* 25. That is, *that after a judgment in our courts the party ſhall be in peace until the judgment be undone by attaint or error.* So if a judgment be had by covin or colluſion againſt an executor to defeat the creditors, if it be pleaded in bar, the covin and collu-

Harning a. Caſtor.

Judgment obtained by oppreſſion fruſtrate by common law.

ſion may be averred in the, replication and the judgment ſhall be fruſtrated thereby. 3 *H.* 6. 36.

So if an infant be inveigled to be bail for one in any court at *Weſtminſter*, he may have an *audita querela* to avoid it. *Trin.* 7 *Jac. Markham verſus Turner*, 8 *H.* 6. 10.

Every outlawry is a judgment, yet the defendant may have remedy in conſcience againſt him that cauſeth him to be outlawed without juſt cauſe. *Doct. Stud. Lib.* 2. *cap.* 21. 21. *H.* 7, 79. *H.* 76, 20. if one neglect to enrol his bargain and ſale being his only aſſurance, as in *Jaques contra Huntley* in this court, 13 *Januarij* 1599, and the bargainer bring an *ejectione firme* againſt him, and hath judgment, ſhall not the bargainee reſort to the Chancery and there be relieved? if not for the land, yet for the money paid.

Tenant

Tenant for life, the remainder for life, the remainder in fee of a houſe. Tenant for life commits waſte. Againſt whom? he in remainder in fee brings an action of waſte, and judgment is given againſt him. But afterwards he may exhibit his bill in equity, to compel the leſſee in poſſeſſion to repair the houſe, otherwiſe it may be utterly ruined as well to the prejudice of the commonwealth, as the party; and therefore in *Morgan contra Perie Paſch 27 Eliz.* a woman had an eſtate in a houſe diſpuniſhable of waſte, yet ſhe was enjoined not to commit waſte in the houſe.

SECONDLY TO CONSIDER THIS AS A JUDGMENT UPON A STATUTE.

It hath ever been the endeavour of all the parliaments to meet with the corrupt conſciences of men, as much

much as might be, and to ſupply the defect of the law therein, and if this caſe were exhibited to the parliament it would ſoon be ordered, and the Lord Chancellor is by his place under his Majeſty, to ſupply that power, till it may be had for matters of *meum* and *tuum*, between party and party; and the Lord Chancellor doth not except to the ſtatute, but taketh himſelf bound to obey the ſtatute according to 8 *E.* 4. and the judgment thereupon may be juſt, and the college may have a good title at law, as the judgment yet ſtands in force.

It ſeemeth by the Lord *Cook*'s eighth part of his report fol. 118. Dr. *Bonham*'s caſe, that ſtatutes are not ſo ſacred, as that the equity of them may not be examined; for he ſaith that in many caſes the common law hath ſuch a perogative as it can control acts of parliament and adjudge them void, as if they be againſt common

common right or reaſon, impoſſible to be performed, and repugnant, and for that 8 *E.* 3. 30. 33. *E.* 3. 42. *Nat. Brev.* 209. 5. *E.* 4. 10. 27. *H.* 6. 41. 21 *Eliz. Rot.* 303. *Dyer* 213, and yet our books are, that the acts and ſtatutes of parliament ought to be reverſed in parliament, and if they err, that ſuch error is to be reverſed by parliament, and not otherwiſe, *Brev. de Error* 14. 7. *H.* 6. 28. 21 *E.* 4. and upon that reaſon the Lord Chancellor ſince the device of actions brought by Parſons upon the ſtatute of 2 *H.* 6. have enjoined the ſtay thereof.

And the judges do play the Chancellor's part upon ſtatutes, making conſtructions of them according to equity from the rules and grounds of law, and enlarging them *pro bono publico* againſt the intent of the makers thereof, of which our books have inſtances in many hundreds of caſes, 15 *H.* 7. 8. 14. *H.* 7. 14. 42. *E.* 3. 6, *&c.*

If

If you will have equity ſuppreſt in all caſes, upon a judgment at law, or upon a ſtatute where is the uſe of the court of Chancery? that court having been in all ages at liberty to examine equity in all caſes but againſt the King's prerogative. 35 *H.* 6. 27. 11. *H.* 4. 16. *Doctor* and *Student*, *lib.* 2. *cap.* 5. 16 And then you muſt have a ſpecial ſtatute to exempt the Chancellor in reſpect to matters in equity, from thoſe general ſtatutes which are framed for the particular uſe of the great courts at *Weſtminſter*.

In the Chancery upon a recognizance, a *capias* may be awarded, and the precedents of that court ſhall cloſe up the mouths of the judges of the common law, notwithſtanding the ſtatute of *Magna Charta*, *cap.* 29. *quod nullus liber homo capiatur aut impriſonetur niſi per legale judicium parium ſuorum vel per legem terræ.* And ſo it was adjudged in *Clement Parſon's* caſe,

Trin.

Trin. 21 *Eliz.* in the Exchequer, 21 *Eliz. Martin contra Wilbin*, & in 7. *Jac.* C. B. *Hickman's* caſe, *Ognolle's* caſe vouched to be adjudged *per contra Cook*, 2 *R.* 2. 9. every court at *Weſtminſter* ought to take notice of the cuſtoms and uſages and other courſes of the reſt of the courts there, and the cuſtoms and courſes of every of the courts at *Weſtminſter*, are as a law which the common law takes notice of, 2 *Cook* 53, 65, 503. 4 *Ed.* 4. 1. 11. *Ed.* 4. 21. The ſtatute of the 5th of *Elizabeth* for perjury directeth how perjury ſhall be puniſhed, ſaving the authority of the ſtar-chamber; yet for perjury committed in the Chancery, either in an affidavit or anſwer, if it appear to the Chancellor, then the party may be puniſhed according to his direction.

8 Co. 142.

9 Co. Dr. & Stu. 29, 306. a.

No Exchequer man hath priviledge againſt a ſubpoena for

matter between party and party, where the King's intereſt cometh not in queſtion, 20 *Eliz. Cutts contra Peter Goodwin*, 28 *Eliz. Goodwin contra Hugor*; and yet their priviledge hath ſeveral ſtatutes that giveth ſtrength thereunto, but the uſe and precedents of the Chancery, are not altered by theſe laws.

A ſtatute ſtaple moderated by decree.

If a ſtatute ſtaple be extended, which by ſtatute is a judgment by itſelf, and the execution thereof directed by ſtatute, yet it hath been uſual in all ages, to moderate the hard conſciences of the connuſees, that if they have been ſatisfied with their coſts and damages after the rate of the full value of the land, the land hath been diſcharged by decree.

The law of the land ſpeaketh not againſt this. For 9. *Ed.* 4. 15. The Chan-

Chancellor ſits in Chancery according to an abſolute and uncontroulable power, and is to judge according to that which is alledged and proved; the Judges of the common law are to judge according to a ſtrict and ordinary, or limited, power.

7. *H.* 7, 10. *A.* had lands extended to him in antient demeſne, by ſtatute, merchant, *B.* purchaſed the lands, and had a recovery by ſufferance, in the court, of antient demeſne, upon a voucher, and entered and ouſted. *A.* brought a ſubpoena, and it was held, that *A.* could not ſatisfy the recovery, at law, and therefore he ſhould be reſtored to the poſſeſſion by the Chancery, for he had no remedy by the law, where notwithſtanding a double judgment, yet the Judges directed them to the Chancery.

And the ſtatate of 4 *H.* 4. *chap.* 23. was never made nor intended to reſtrain the power of the Chancery, in matters of equity, but to reſtrain the Chancellor and the Judges of the common law, only in matters meerly determinable by law, in legal proceedings, and not in equitable, and that they ſhould be conſtant and certain in their own judgments, and not play faſt and looſe. For by 37 *H.* 6. 13. and divers other authorities; no writ of error or attaint lieth when the Suit is by ſubpaena, and the Party only ſeeks to equity for the equity of his Cauſe.

And therefore judgments by default, confeſſion, *&c.* and not by verdict, are not within this law, ſo as to bind the Judges in their legal proceedings; as 5 *E.* 4. 38. In debt upon an obligation againſt *A. B.*

A. B. C. and *D.* judgment, by default is had againſt *A.* and *B. C.* demurrs, and *D.* pleads to iſſue, and by the opinion of the judges a ſuperſedeas was awarded, *& hoc cauſa conſcientiae*, for that the judgment was by default.

In the next place it is conſiderable, how far the ſtatute of 27 *E.* 3. cap. 1. doth extend, to check the power of the Chancery in this caſe. Now the proper expoſition of this ſtatute is from thoſe ſtatutes that were the foundation thereof, and whereupon this ſtatute was built, it being not introductive of new law; but declarative *Antiquis Juris.*

The precedent ſtatutes which do explain this ſtatute, are 31 *E.* 1. made at *Carliſle*, 4 *E.* 3. *c.* 6. in confirmation thereof, 25 *E.* 3. *cap.* 22. and 25 *E.* 2. *cap.* 1. of pro-

proviſions of benefices, theſe being in time before 27 *E.* 3. and 38 *E.* 3. which comes after, and recites the ſtatute of 25 *E.* 3. and this ſtatute of 27 *E.* 3. and confirms them with additions for further Remedies, they being all linked together in one chain, which is further apparent by the recitals in the law, and by the preamble thereof, which doth manifeſt the minds of the law-makers, and do naturally explain the laws, that they do all extend to eccleſiaſtical juriſdiction and Conuzance, and not to temporal; and the ſame is more apparent, by other ſubſequent laws in ſeveral kings reigns following.

But for the temporal courts, and th ſupport of their Judgments, there are only two Statutes, *viz.* *Weſtminſter*, 2 *cap.* 5. and 4 *H.* 4. *cap.* 23. which are already anſwered.

Vide

Vide the argument for the authority and Juriſdiction of the court of Chancery, at the end of Reports in Chancery, where theſe two ſtatutes are explained.

THE END.

ALLEN's CASE IN CHANCERY.

EDWARDS, a citizen of *York*, that had born the office of Sheriff there, being indebted to *Allen*, haberdaſher, and others, of *London*, for wares, became bankrupt, becauſe he ſuffered himſelf to be outlawed at the ſuit of Mrs. *Young* of *York*, for debt.

Allen and *Hubberſley*, and ſome other creditors of *London*, by petition to the Lord Chancellor, procured a commiſſion upon the ſtatute of bankrupts, againſt *Edwards*, to Sir *John Bennett*, Sir *William Bonmey*,

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mey, Mr. *Nicholas Fuller*, and Mr. *Richard Aldworth*.

The commiſſioners did ſell by deed of bargain and ſale, and ſale enrolled, all the bankrupt's lands, to *Allen* and *Hubberſley*, for 400 *l.* the land being then worth 2400 *l.* but ſold it ſo cheap as 400 *l.* in reſpect it ſtood incumbred with a mortgage to Alderman *Adrian Bowles*'s ſon, and with a ſtatute of 2000 *l.* to *Adrian Bowles* himſelf, defeaſanced to pay the mortgage money, and 200 *l.* more lent by *Adrian*, and all ſuch ſums as *Edwards* then owed to *Adrian Bowles* and *Smith*, or ſhould owe, for wares delivered, or to be delivered within three years following: And it ſtood alſo incumbered with a ſtatute of 1500 *l.* to *Adrian Bowles* himſelf, defeaſable, firſt for 800 *l.* and after upon 200 *l.* more, lent, in the whole 1080 *l.* the 80 *l.* being intereſt; and ſtood alſo incumbered with a leaſe

leaſe for 80 years, of part, made to one *Cheney:* all which incumbrances were made lien, being before he was bankrupt, and before he became indebted to *Allen*, or any of the *Londoners*, which ſued out the commiſſion.

After this ſale, the commiſſioners, and all other the creditors that ſued out the commiſſion, upon full conſideration had of the eſtate of the bankrupt, how it ſtood incumbered with the mortgage, by ſtatutes and leaſes, made an agreement with the bankrupt and his friends, to this effect.

That the creditors would take 10*s.* in the pound, for their due debts and ſuits, and would undertake on the behalf of the bankrupt, to be bound for payment thereof, to the creditors, and it was agreed that *Allen* and *Hubberſley* ſhould convey the bankrupt's eſtate to them for

their ſecurity, which agreement was certified by the commiſſioners; and they do alſo certify, that *Allen*, after his agreement, being ſo godly and charitable, refuſed the agreement, and ſought the advantage of the law, to the great loſs and hinderance of the reſt of the creditors, and to the utter undoing of *Edwards* the bankrupt, his wife and children for ever.

In execution of this agreement, 12*l.* 10*s.* was paid to one of the creditors, and conveyances were drawn by Mr. *Fuller* and engroſſed ready for perfecting the aſſurances, notwithſtanding all which, *Allen* refuſed the agreement; *Hubberſley* preferred a bill in Chancery againſt *Edwards*, Alderman *Bowles*, *Smith*, *Wood*, *Cheney*, and *Edwards*'s father, a man eighty years old, complaining that the mortgage, ſtatute and leaſe were all fraudulent, and the money not being paid

paid the whole was kept on foot by practice to prejudice the creditors, and the ſale made by the commiſſioners.

Edwards the bankrupt, *Smith*, and *Wood*, preferred a croſs bill againſt *Allen* and *Hubberſley*, for performance of the agreement of 10*s.* in the pound, and to convey the land to *Smith* and *Wood* according to the agremeent.

At the hearing of the cauſe upon *Allen's* bill, the Lord Chancellor finding it confeſſed, that of the mortgage money there was unpaid but 30*l.* ordered that *Allen* paying that 30*l.* ſhould have the lands conveyed to him, and *Hubberſley*, and the ſtatute of 2000*l.* diſcharged, which was done accordingly, and a decree that *Allen*, *Hubberſley*, and their heirs, ſhould enjoy the land according to the ſale of the commiſſioners, free from the incumbrances and charges

charges of alderman *Bowles*'s ſtatute. Howbeit upon another motion his lordſhip ſtayed the *Liberate* after the extent upon that ſtatute, and ſo it ſtay'd till *Allen* thus having gotten the incumbrance cleared by the court of Chancery ſought to hold the land for 400 *l.* only, which was worth 2400 *l.* albeit he had covenanted with the commiſſioners in the bargain and ſale, that if the lands were ſold for more than 400 *l.* within three years, then he would pay the overplus which it ſhould be ſold for above that 400 *l.* towards ſatisfaction of creditors; and all the incumbrances being cleared within three years as aforeſaid, yet would he hold the land for 400 *l.* and pay no more for it.

Hillary 7 Jac. Allen gets a commiſſion out of the Chancery to the Sheriff of *Yorkſhire*, to put him in poſſeſſion of the land upon the firſt decree

decree in Chancery made for him, and *Allen* with the under Sheriff, caſt *Edwards*'s ſix children, all infants, out of doors; and although the Under-Sheriff with tears in his eyes beſought *Allen* to take compaſſion on them, yet he would not yield to any of them, but turned them out in the froſt and ſnow that they were enforced to ſuccour themſelves in a maſhfatt; and when ſome of the tenants of the land would have taken them in and relieve them, *Allen* threatened to turn them out of their tenements if they did ſo, and turned one of the tenants out of his houſe who entertained them but one night.

Alſo, *Allen* took divers chattles and goods that were *Edwards*'s fathers, and not the bankrupts, as ſix kine, &c. and the old man ſuing in the *King's-bench* for them, *Allen* procured an injunction out of the Chancery, and ſtaid all the ſuit ſo long as the old man lived, who ſhortly after died.

Edwards

Edwards and his wife being here at *London*, following the ſuit to be relieved againſt *Allen* in *July* 8. *Jac.* died both together of the plague, leaving ſeven poor children behind them, one ſucking at the nurſe in *Yorkſhire*.

The Lord Chancellor being informed of the extremity of the petition and affidavit, gave directions that the bill which *Edwards*, *Smith*, and *Wood* preferred, ſhould be revived on the behalf of the poor children; and his Lordſhip aſſigned *Wood* their guardian to proſecute, and *Francis Moor* he aſſigned to be of their council in *forma pauperis*.

The cauſe coming to a hearing, and the agreement appearing confeſſed by *Allen*'s anſwer, and proved by the certificate of the commiſſioners, and divers witneſſes, and the covetous and unconſcionable dealing of *Allen*, who

who for 400 *l.* would take advantage of land worth 2400 *l.* and the purpoſe of the commiſſioners appearing plainly by the covenant which they took of *Allen*, that *Allen* ſhould pay the overplus of the value of the land above 400 *l.* if it ſhould be ſold for more, and the unchriſtian and uncharitable uſage towards the poor fatherleſs and motherleſs children of *Edwards* being all infants, not being able to help themſelves conſidered.

The Lord Chancellor did decree, that *Allen*, and the reſt ſhould be ſatisfied with 10*s.* in the pound for their due debts according to their agreement certified by the commiſſioners. But no abatement of the 400 *l.* paid for the land, nor of the 30 *l.* paid for the mortgage, and withal that *Allen* ſhould have allowance for the coſts of ſuit reaſonable, and for this purpoſe his Lordſhip made a reference to Sir *John Tindall*

to caſt up the ſtate of the bankrupts, affairs and the debts, and to certify what overplus he found for the relief of the poor children.

Sir *John Tindall* often heard the cauſe, and the allegations of *Allen*, and the council, and in the end made a certificate of the eſtate real and perſonal of the bankrupt, and of the debts, and made all allowances as by the order was directed, and gave 200 marks to *Allen* for coſts of ſuit, 100*l.* to *Hubberſley*, and 70*l.* to all the creditors that ſued out the commiſſion of bankruptcy, and for the reſidue in his own opinion, did propoſe it to be fit that *Allen* ſhould either keep the land and pay the overplus of the value of the land above the 400*l.* or part with the land to *Smith* and *Wood*, who ſhould pay *Allen* and the creditors according to the report, and yield the overplus to the children, amounting to 600*l.* or thereabouts.

The

The Lord Chancellor upon read-the report in court, gave *Allen* time to make his election, whether he would keep the land and pay the money, or depart with the land and ſave his money. *Allen* made no election but inſiſted upon the advantage to have the land for 400*l.* which was worth 2400*l.* and would yield nothing to the poor children nor the creditors, but deal ſo mercileſly with them whoſe parents loſt both their lives in following their ſuit to be relieved againſt *Allen*'s unchriſtian and barbarous dealing.

The Lord Chancellor did make a decree that *Allen* ſhould receive the money mentioned in the report, which is much more than in equity is due unto him, and convey the land to *Wood* and *Smith* two ſufficient men, who ſhould be bound to pay the creditors and *Allen* alſo, and

and yet pay the overp'us being 600 *l.* or thereabouts amongſt the young children.

For not performing the decree, Allen *is committed.*

The pitiful cries of the father and mother dying as is aforeſaid, and of the poor orphans who call to God for relief, and move the Chancellor to take compaſſion upon them, and to take ſuch order as he hath done. Note, that *Allen* in the bill ſetteth forth that he hath two judgments for his debt in the Common Pleas before the ſuit in Chancery began, which judgments he ſuppoſeth to be called into examination by this ſuit and decree in Chancery againſt him, contrary to the laws and ſtatutes.

To this it is anſwered, firſt, that theſe judgments were not alledged by *Allen* in his own bill againſt *Ed-*

wards

wards in Chancery nor in his anſwer to *Edwards*'s, bill nor in any replication, rejoinder, depoſition, report, or motion in Chancery; neither were they as much as informed or ſpoke of to any council or others, and there is no order in Chancery concerning thoſe judgments. Second, that thoſe judgments appear to be a year after *Edwards* became a bankrupt, for he was a bankrupt *Jac.* I. and the judgments were *Jac.* II.

Note, that theſe judgments ſtood in force againſt the bankrupt's body, or any lands or goods which he ſhould afterwards obtain, and were not diſpoſed by the commiſſioners.

Allen himſelf took out the commiſſion of bankrupts with the other creditors, and was firſt named in the petition to the Lord Chancellor; for getting the commiſſion and attended in perſon in the execution of

that

that commiſſion, at all meetings by which himſelf did decline from the ſtrength of his judgments and ſubmitted himſelf to be ordered by the commiſſioners for his debt before any ſuit in Chancery began.

Note, where *Allen* by his bill of indictment, ſuppoſeth his freehold to be drawn in queſtion in the Chancery, contrary to the ſtatute of *Magna Charta*, it is to be anſwered, that although freeholds have been always ordered in Chancery upon equity where the common law cannot help the party's, yet in this particular caſe it is to be obſerved, that *Allen* himſelf was firſt plaintiff in the Chancery, and did there draw in queſtion, the freehold, which then was in the hands of Alderman *Bowles*'s ſon, by a mortgage forfeit, for which freehold (to be conveyed to himſelf) he obtained the decree in Chancery, and had it conveyed accordingly upon matter of equity, *viz.* becauſe there

there was but 30*l.* impaid of the mortgage money. Therefore if the Chancery did well when it dealt with the freehold for *Allen*; why ought not the Chancery, upon a new matter of equity, make a new decree againſt *Allen*, to depart with the ſame freehold again, when it was ſo, that he ſought to keep it for 400*l.* being worth 2400*l.* to the defrauding of creditors and poor orphans, and in abuſe of the commiſſioners of bankrupts and court of Chancery.

THE END.

there was but 30*l.* unpaid of the mortgage money. Therefore if the Chancery did well when it dealt with the freehold for Allen; why ought not the Chancery, upon a new matter of equity, make a new decree against Allen, to depart with the same freehold again, when it was to that he ought to keep it for 400*l.* being worth 2,000*l.* to the defrauding of creditors and poor orphans, and in abuse of the commissioners of bankrupts and court of Chancery.

THE END.

THE CASES OF CONSCIENCE,

Generally practiſed in the CHANCERY.

IF a man have Feoffees to his uſe, and make a laſt will, and willeth that his feoffees ſhall make an eſtate to *A.* for term of life, the remainder man or heir at law, is without remedy of any writ of courſe; yet becauſe there is a conſcience in it, the Chancery ſhall

help by ſubpoena againſt the feoffees.

Covenant without ſpecialty.

If there be covenants made without ſpecialty, albeit you have no writ of covenant by the courſe of the common law, yet out of the Chancery if the covenant can be proved by witneſſes, the covenantee ſhall be holpen in conſcience by ſubpoena.

If a man have title to lands, tenements, and hereditaments, and his evidences do remain in the tenants hands or in any other man's hands, and the plaintiff knoweth not the number of them, or whether they be contained in cheſt, bag, or box, or in any other thing, then foraſmuch as they cannot have the writ *de charta reddenda*, conſcience ſhall help by ſubpoena, and the ſame remedy ſhall be in the writs of debt and detinue where there is an incertainty in the debts or goods.

If

If a man enffeoff another of certain lands or tenements to his uſe, and the feoffee do ſell the lands to another, and give notice to the buyer at the time of the buying, and declare the intent of the firſt feoffment. The ſecond feoffee, albeit there lieth no ordinary writ at common law againſt him for the performance of the will of the firſt feoffee, yet in conſcience he ſhall be compelled to perform it.

If by teſtament or laſt will the uſe of cattle, or of a ſtock of beaſts, or of ſuch like, be deviſed or bequeſted by ſubſtitution or condition, after the manner of the eſtate tail, albeit there lieth no ordinary remedy in law, yet becauſe it chanceth very often in many men's caſes in conſcience it ſeemeth to be holpen in Chancery.

If one man be bound to two, to the uſe of one by obligation, and he which hath no uſe in the ſame, releaſeth to the obligor all actions; the obligor is diſcharged from any ordinary action or writ in the common law againſt him by the other obligee. But the obligee unto whoſe uſe the obligation is made, may have by conſcience a ſubpoena in the Chancery againſt the other obligee that did releaſe, *Cole* and *Moor Jac.* V. *Michael.*

If a man by force of a writ of debt, hath recovered againſt another debt and damages, and he againſt whom judgment is given, doth pay without acquittance or releaſe, notwithſtanding which the party ſueth execution upon the ſame judgment, there is no remedy at law, but he muſt pay it again to ſatisfy the execution, becauſe he had no ſufficient diſcharge. At firſt, the common-law judges, refuſed to let the chancery

ry give remedy in theſe matters, for if it ſhould be otherwiſe, every record ſhould be examined in the Chancery, which were a great inconvenience to the ordinary proceedings; nevertheleſs at this day if the firſt payment without acquittance or releaſe can be proved by witneſs or otherwiſe, the party ſhall be remedied conſciinence by a ſubpoena.

Foraſmuch as there be divers tenures of cuſtomary mannors held by copy of the court roll; if any manner of actions in the form or nature of real or perſonal, or mix'd actions, be between the lord or any officer of the court, and the tenants by copy hold, for wrong done by the lords or officers, then the tenants by conſcience ſhall be remedied by a ſubpoena.

If a man have an obligation or acquittance written or ſubſcribed only by another man's hand, and the obligation or acquittance hath no ſeal to it, albeit the ſame is not plead-

pleadable by any ordinary writ before the judges, yet in conſcience he ſhall have remedy by bill of complaint or ſubpoena.

Foraſmuch as legacies are in a ſtrangers hands and not in the executors there lieth no writ of courſe, nor action of eccleſiaſtical law or common law, therefore the legatories ſhall be holpen in Chancery by a ſubpoena.

And if an inheritance deviſeable by will, or chattle real given by will, if the deviſe be qualified by the teſtator, other than as ſpecially provided by the laws of the realm, if there depend a charity or conſcience of the ſame the Chancery ſhall provide remedy in favour of the laſt will.

If a man bind himſelf by obligation or recognizance in a penalty of a great ſum, to pay a leſs, if the penalty be forfeited for lack of payment

ment at the day on the debtors part, having ſuffered delays or caſual lets to occur before the day of payment, as the Lord Chancellors conſcience may be moved therein with pity, he may mitigate the penalty, if the judgment be not given before at the common law, and grant an injunction, on a bill depending in his court.

See Lord Oxford's Caſe.

A ſuit depending in the Chancery and not determined, if any of the perſons in the mean time take any action for the ſame matter in any other court, the Chancellor of *England* may ſtay the ſame by an injunction addreſſed to the parties attorneys or counſellors.

In caſe that one out of the term be unquieted of, or in the occupation of his lands or tenements, wherein he hath had long and quiet poſſeſſion by title or ſpecialty not determined, the night, fortnight, or month, or in ſome ſhort time before his complaint, and

and doth ſhew his ſpecialty of the ſame in court, or at the leaſt prove it by a witneſs, or bind himſelf to prove it within a day to be limited, then the Lord Chancellor hath commonly uſed to grant an injunction to ſtay him in poſſeſſion till the matter be heard.

Where eccleſiaſtical perſons have no remedy for tythe of ſuch woods as are cut down for fewel, or other uſes every year or every term, for twenty years or under, and by ordinary writ or eccleſiaſtical, they dare not meddle therewith, the Chancery by conſcience and a ſubpoena hath uſed to help for tythes.

If the Lord overcharge the Commons the tenants have no remedy by ordinary writ *de admenſuratione, Paſturæ*, (as they have between tenant and tenant, where many tenants be,) wherefore they may have remedy in the Chancery.

If

If a man be bound to another by obligation in common ſums of money, and the obligee bring an action of debt in another country, and the obligor in Chancery ſueth for remedy, pretending that by foreign ſuit he was put from divers pleas which he might have had if it had been brought into the country where the obligation was made, it is good matter in Chancery by conſcience and equity to be relieved.

And foraſmuch as malice of men doth daily breed ſuch new matters as there is no remedy for the ſame at the common law, he ſhall have remedy by the abſolute power of the Chancery if conſcience and equity moveth. And therefore albeit for the plowing of meadow there lieth a writ of waſte, yet for plowing of paſture, there lieth none, and yet by conſcience there is a ſubpoena for relief of the ſame.

If a man give lands or tenements *causâ matrimonii prolocuti*, without bill indented, albeit, there lieth no remedy by ordinary writ, he may be holpen in the Chancery by a Subpœna.

If a tenant be bound by deed indented to find and keep up his tenement, the building ſeeming to be ſtrong and maintenable, with reparation, if the building be ſo rotten and ruinous that it will bear no reparations, the tenant may be holpen by conſcience, becauſe there is no remedy or ordinary writ in that behalf.

If a man have paſſage appendant by a bridge, unto his manor or lands, and ſuch perſons as ſhould repair the bridge, let it decay, becauſe there is no ordinary writ againſt him that ſhould amend or repair the bridge;

bridge; the party ſhall be holpen in equity by the Chancery.

The Lord Chancellor hath divers times examined judgments given at the common law. As for Inſtance, *Shegs* was bound to *Heath* in 200 marks, for payment of 8*l.* by quarterly Payments, and the ſame *Heath* came to *Shegs* a month before the day of the quarterly payment, and received his 40*s.* and gave an acquittance: nevertheleſs becauſe he paid it not at the very day, *Heath* commenced his action of 200 Marks againſt *Shegs* in the King's-Bench, and the ſurety with ſaid *Shegs*, and had execution againſt the ſurety. And this matter was opened in the Chancery, whereupon a writ was awarded to bring up the body of the ſurety, and upon a caution laid in the court, he was ſet at large, and in the examination there appeared no cauſe of action, whereupon the caution was reſtored again to *Shegs*, and his ſurety diſmiſſed, with

4 marks coſt paid by *Heath* to *Shegs*, *pro falſo Clamore*.

And many ſuch like caſes do oftentimes happen; and altho' divers lawyers, as *Montague*, *Gaudy*, and others, have ſpoken againſt injunctions, yet ſhortly after, they have been ſuiters in ſuch like caſes themſelves, ſo that a new fee often makes them deviſe a new opinion.

The Lord Chief Juſtice of the King's-Bench gave much reſpect to the Chancery, ſaying, that when the ſubjects do attempt any matter againſt the commonwealth, the Lord Chancellor may by ordinary awards, proceed againſt them, but no other court can do ſo except the Parliament, and that by good warrant in *magna charta*, where it is ſaid *unuſquiſque puniatur ſecundum quantitatem delicti*.

If

If *C.* be ſeiſed of the manor of *Dale*, for term of his life, and the remainder in tail to a feoffee, for another man's uſe, or for a woman's jointure: *C.* is attainted of Treaſon, the party grieved, muſt ſue to the King by petition of right, and when the King has ſigned his bill, he muſt exhibit the ſame ſigned to the Lord Chancellor, and ſo to the King's learned council, and thereupon a writ of ſearch muſt be directed to the Lord Treaſurer, to certify if any record do make for the King's intereſt, and between every writ there muſt be forty days, and you cannot have a ſecond writ, till the firſt be returned.

And it is ſo in the caſe of two joint-tenants, if the one be attainted of treaſon, whereby the King entered into all the lands, the ſurvivor hath no help but by a petition of right.

A ſubpoena ſued out againſt one, returnable the laſt day of the term, if the defendant do appear, and find no bill in court, he ſhall have his coſts; yet the defendant is at liberty to appear the firſt day of the next term.

If a ſubpoena be ſued out againſt one, returnable at a day certain, being the laſt day of the term, and he doth appear, yet he is at liberty to make his anſwer before the firſt day of the next term, and ſo it was ruled in *Trin. Term: Anno* 41*ſt*, *E. inter Foe, et al.*

The plaintiff having put in his bill at the return of the Subpoena, and the defendant appearing, if the plaintiff do haſten the defendant to put in his anſwer, he is to give a day unto the defendant's attorney for the anſwer, which is that day ſeven-night; which anſwer, if it be not put in that day ſeven-night, then the plaintiff

plaintiff the next day after is to enter his attachment in the regiſter, and pay two-pence for the ſaid entry.

The attachment being iſſued the defendant comes and puts in his anſwer, not compounding for the attachment, and ſo goes his way: the next term he offereth to give day to the plaintiff, that may not be, neither can he enter any day in this caſe, for he muſt ſatisfy the contempt to the court, before any ſuch day can be given, and ſtand *rectus in curia*. Notwithſtanding the plaintiff has taken out his attachment, and the defendant has put his anſwer in after-wards, and the court is not ſatisfied, the plaintiff may proceed with proceſs of contempt as well as upon the body of the cauſe; and if the plaintiff do proceed to a commiſſion of rebellion, then the defendant is to pay 50*s*. at the leaſt, for the proclamation, and for the attachment, 10*s*.

If

If the plaintiff have let his cauſe lie dead for above a year, and nothing is done, he muſt then ſerve the defendant with a ſubpoena *ad faciendum attornatum.*

The matter having been dead a year or more, the defendant may urge the plaintiff to proceed, as thus, the anſwer was above a year's age, and nothing done, in the mean time, the defendant may give the plaintiff's attorney a day to reply, and it muſt be entered in the regiſter, *viz.* a week muſt be given if the plaintiff put not in his reply, then the next day coſts are to be anſwered.

The reply being put in in due time, the defendant may at his choice, take out a commiſſion, but then he may rejoin whether the plaintiff will or not, but if the plaintiff will, he may carry the commiſſion; but if the

the defendant be unwilling to proceed, the plaintiff muſt ſerve the defendant with a ſubpoena to rejoin.

If The defendant's anſwer is put in at the time given, the plaintiff may take a ſubpoena the ſame term, *ad rejungend.* if he can conveniently ſerve it, and then if the defendant do not appear, the plaintiff may have a commiſſion *ex parte*, but ſomebody muſt make oath of ſerving the ſubpoena. If a commiſſion joined is returned, the plaintiff is to give that day ſeven-night after the return for publication, and the next day they make copies of that commiſſion, if in the mean time, the defendant hath not ſhewed cauſe to the court for an order for ſtay of publication.

If A commiſſion *ex parte* is returned the attorney for the party for whom the commiſſion was, is to give two common return days to the attorney

on the other ſide, for to produce witneſſes if he have any, which muſt be entered in the regiſter, and 4 *d.* to be paid for the ſame; thoſe days expired, he muſt give unto the attorney again another return, which is a day peremptory; and that muſt likewiſe be entered in the regiſter, and 4 *d.* is likewiſe to be paid for the ſame: Which day being likewiſe out, he muſt then give further that day ſeven-night for publication; and if the cauſe be ſhewn in court, then publication muſt be likewiſe regiſtered, for which is likewiſe to be paid 4 *d.*

AN

AN

ORDINANCE,

Published by

Sir *NICHOLAS BACON*,

Lord Keeper of the Great Seal of *ENGLAND*.

Concerning Commiſſioners *in perpetui rei memoriam*.

FIRST, the commiſſioner ſhall examine no witneſſes, but ſuch as be aged and impotent.

Secondly, If the plaintiff or party that ſueth forth the commiſſion, ſhall

give warning by precept from the commiſſioners unto the party that ſhould take prejudice by his examination, by the ſpace of 14 days at the leaſt, of the time and place where and when the ſaid commiſmiſioners will ſit upon this commiſſion, the ſame warning being to be certified to the commiſſioners by oath of the party, or of ſome credible perſon, before he ſhall proceed to the examination of the commiſſion.

Thirdly, If the ſaid party averſant, can ſhew the commiſſioners good cauſe of exception, either againſt the witneſſes produced by the plaintiff, or againſt the commiſſioners themſelves, or otherwiſe, then they are to ſurceaſe upon the examination of the commiſſion; which cauſes and exceptions ſhall be certified up with the commiſſion, and all the proceedings thereon.

Fourthly,

Fourthly, If the ſaid party averſant, cannot ſhew ſufficient cauſe as aforeſaid, then the commiſſioners to proceed to the examination, and the ſaid defendant to have liberty to join in the examination of the ſame witneſſes, or of any other upon interogatories on his behalf, if he think good to do the ſame.

Fifthly, The party that prayeth publication of the witneſſes examined as aforeſaid, ſhall firſt by himſelf, or ſome other, take oath that the ſame witneſſes are neceſſarily to give evidence on his behalf at the hearing.

Sixthly, Oath is to be taken that the ſaid witneſſes be either dying, or ſo aged and impotent, that they cannot travel, to certify the truth *viva voce*, without danger of life.

Seventhly, This oath being taken, a Maſter in Chancery is firſt to open

open the commiſſion, and to conſider whether this order before written, hath been obſerved in all points, if ſo, publication ſhall be granted.

Eightly, provided that no ſuch depoſition ſhall be given in evidence but againſt thoſe perſons that were warned by precept as aforeſaid, or againſt their heirs or aſſignees.

Ninthly, Provided alſo that after the examination taken as aforeſaid, and after publication had and granted of the examinations, the party adverſant, ſhall not be admitted to have a new examination on his behalf for or concerning the ſame matter.

Tenthly, The commiſſioners ſhall certify in their return, ſuch exceptions as the defendant ſhall take againſt the proceedings in the ſaid commiſſion, and whether the defendant

fendant did appear, and if not, then whether the affidavit was made (by or for the plaintiff) that precepts were ſerved.

Eleventhly, Theſe orders being engroſſed in parchment, and ſubſcribed with the hand of the regiſter of the Chancery, ſhall be ſent annexed to every of the ſaid commiſſions.

Signed by the hand of the Lord Keeper of the Great Seal of England.

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